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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

*Dennis R. Patrick, Chairman

James H. Quello

Patricia Diaz Dennis

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*Chairman Patrick resigned August 7, 1989.
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Federal Communications Commission Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERITECH OPERATING COMPANIES
Revisions to Tariff F.C.C. No. 2

Transmittal No. 287

ORDER

Adopted: July 19, 1989; **Released: July 21, 1989**

By the Deputy Chief, Common Carrier Bureau:

1. By the referenced transmittal[1] the Ameritech Operating Companies (Ameritech) propose revisions to the price levels for DS1 Local Distribution Channels (LDCs) in the states of Illinois, Michigan, and Wisconsin, "thereby completing for those companies the population of the extant three-tiered rate structure." Ameritech Tr. No. 287, Description and Justification (D&J) at 1. Under this rate structure, the rate for the second DS1 LDC on a system is lower than the rate for the first (which is consistent with the rate structure that Ameritech currently has in effect) and the rate for the third and any additional LDCs is lower still. Ameritech first proposed this three-tiered rate structure for DS1 LDCs in its Transmittal No. 221. This structure, along with various other revisions to its access tariff, became effective December 24, 1988.[2] The instant transmittal represents Ameritech's first proposed revisions to rate levels for DS1 LDCs to reflect the revised rate structure.

2. MCI Telecommunications Corporation, Teleport Communications Group, Metropolitan Fiber Systems, Inc., Indiana Digital Access (IDA), and Diginet, Inc., have filed petitions to reject or suspend and investigate the captioned transmittal. Ameritech has filed a reply to the petitions. These pleadings almost exclusively address Ameritech's proposed DS3 tariff, which is presently subject to investigation, and the proposed area specific rates for DS1 LDCs, which were withdrawn.[3] In addition, Charter Network, Great Lakes Telecommunications, Inc., and NorLight have filed letters in support of Ameritech's proposed tariff revisions and the Association for Local Telecommunications Services has filed an opposition to these letter comments.[4]

3. The Common Carrier Bureau has reviewed the tariff transmittal and the various pleadings. We conclude that no compelling argument has been presented that the proposed tariff is patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

4. Accordingly, IT IS ORDERED that the petitions filed by MCI Telecommunications Corporation, Teleport Communications Group, Metropolitan Fiber Systems, Inc., Indiana Digital Access, and Diginet, Inc., against the captioned tariff revisions ARE DENIED.

5. IT IS FURTHER ORDERED that the letters filed by Charter Network, Great Lakes Telecommunications, Inc., and NorLight ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)

FOOTNOTES

[1] Transmittal No. 287 originally included Ameritech's generic DS3 tariff offering and proposed "area specific" rates for DS1 Local Distribution Channels in Wisconsin. Ameritech's DS3 tariff became effective, subject to the ongoing investigation in CC Docket No. 88-136, following a one-day suspension. Ameritech Operating Companies, DA 89-484, released Apr. 28, 1989 (Com.Car.Bur.). Ameritech has since withdrawn the proposed area specific DS1 rates.

[2] *See* Ameritech Operating Companies, 4 FCC Rcd 738 (Com.Car.Bur. 1989).

[3] IDA also argues that the cost support data supporting Ameritech's proposed three-tiered rate structure for DS1 LDCs are "fundamentally flawed" and that the transmittal therefore should be summarily rejected. IDA Petition at 9-11. No other party addresses the three-tiered rate structure.

[4] These various letters are not authorized by Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, which governs petitions against tariff filings. Therefore, they are not considered in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 14, 1989

Released: July 31, 1989

In Reply Refer To:
63500-DA

A. Thomas Carroccio, Esq.
Santarelli, Smith, Kraut & Carroccio
1155 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Request for Clarification of
Financial Requirements for
RSA Applicants

Dear Mr. Carroccio:

This is in response to your letter of June 30, 1989, in which you request that the Mobile Services Division clarify the Commission's Rules regarding the financial showing required by non-wireline cellular applicants in the Rural Service Areas (RSAs).

You point out that although several of your clients who are applicants in RSA markets complied with the requirements of Section 22.917 of the Commission's Rules by making the requisite financial showing at the time of filing their applications, several of these applicants find that their firm financial commitments are about to expire due to the time that has elapsed since the applications were filed. Therefore, you request that the Mobile Services Division clarify its policy regarding any need for continuing financial showings by RSA applicants whose firm financial commitments have expired or are about to expire. Specifically, you request that the Division address the situations where: 1) an RSA applicant has yet to be selected in the lottery when its commitment expires; and 2) an RSA applicant has been selected in a non-wireline lottery prior to the expiration of its commitment, but its commitment expires before the grant of a construction authorization.

Section 22.917(c)(1) of the Commission's Rules requires that a non-wireline applicant demonstrate that it has a firm financial commitment at the time its application is filed proposing to provide cellular service to RSAs. The rule is silent, however, as to the Commission's policy in the event that the firm financial commitment expires prior to grant of an authorization. Due to processing delays resulting from the large number of RSA markets and applications, the filing of petitions, and a variety of related reasons, these commitments may expire prior to grant. In some cases, the costs associated with renewing the firm financial commitment may place a significant financial burden on the applicants.

Consistent with our Public Notice concerning the firm financial commitment for cellular applicants in the Metropolitan Statistical Area (MSA) markets (*see* FCC Public Notice, Report No. CL-88-24, released November 9, 1987), applicants for cellular markets are not required to renew a firm financial commitment if it expires prior to grant. Rather, they will be required to submit an updated commitment within 30 days of the date of public notice announcing their status as the tentative selectee or sole applicant in the market. Thereafter, applicants must be capable of demonstrating a firm financial commitment for a minimum six-month period from the date of public notice. No further renewal of the financial commitment is required. This need to submit only one updated commitment by the tentative selectee is consistent with our firm financial commitment requirements which are designed to ensure the sincerity of the applicants, the ready availability of funds once a construction permit is granted, and the provision of prompt service to the public. *See Fourth Report and Order*, 64 Rad. Reg. 2d (P&F) 1391, 1396 (1988).

Sincerely yours,

Gerald Brock
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

RANDOLPH CELLULAR LIMITED PARTNERSHIP — File No. 10011-CL-P-336-A-88

For a construction permit to establish a new cellular system to operate on Frequency Block A in the Domestic Public Cellular Telecommunication Radio Service to service the California - 1 (Del Norte) Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: July 18, 1989; **Released: July 31, 1989**

By the Chief, Mobile Services Division:

I. BACKGROUND

1. On February 16, 1989, Randolph Cellular Limited Partnership, Inc. (Randolph) was named tentative selectee for the non-wireline Block A construction authorization for the California - 1 (Del Norte) Rural Service Area (RSA), market number 336-A.[1] Sunshine Cellular (Sunshine), a mutually exclusive applicant, filed a petition to deny and Randolph filed a reply.

II. CONTENTIONS OF THE PARTIES

2. In its petition to deny, Sunshine argues that Randolph's application did not contain a firm financial commitment as required by Section 22.917(c)(1) of the Commission's Rules and, therefore, its application should be denied. Sunshine asserts that paragraph 5 of the letter from First National Bank of Maryland (First National) dated July 7, 1988, makes the loan from First National to Randolph contingent on the ability of James Murray, one of the general partners of Randolph, to execute, if requested to do so, a security agreement in order to provide additional collateral of up to 150% of the amount advanced pursuant to the loan.[2] Sunshine argues that if Mr. Murray does not have additional collateral up to 150% of the amount advanced pursuant to the loan, the bank is not obligated to advance any funds. Accordingly, petitioner asserts, the applicant is not relying on the firm financial commitment of the bank, but rather on the personal financial resources of Mr. Murray. Therefore, Sunshine concludes, the application should have contained a certified audited financial statement and a current balance sheet for Mr. Murray as required by Section 22.917(c)(6) of the Commission's Rules.

3. In its opposition, Randolph states that prior to issuing the letter, First National reviewed the assets of the applicant, including those of Mr. Murray, in determining the creditworthiness of the applicant. Randolph contends that merely because a bank requires collateral as an optional condition to its firm financial commitment does not diminish the fact that it is the bank's and not the individual's funds that will be used to construct the cellular system. Therefore, the Commission is not required to review Mr. Murray's personal finances pursuant to Section 22.917(c)(6). Further, Randolph states, the contingency that Mr. Murray submit additional collateral is not applicable in this case. Randolph submits an affidavit by J. Roger Sullivan, Jr.,[3] which states that because of the valuable potential of the Del Norte market, the additional collateral requirement of paragraph 5 will not be invoked in this case. It is only in the less lucrative markets, Mr. Sullivan states, that the contingency mentioned in paragraph 5 of the bank letter would be invoked. Finally, Randolph notes that the same bank letter was approved by the Mobile Services Division (MSD) when it granted a construction permit to Fairmont Cellular Group, Inc. for California - 6 (Mono) RSA,[4] and to BBB Cellular Partners for Nevada -1 (Humboldt) RSA.[5]

III. DISCUSSION

4. In the *Fourth Report and Order* in CC Docket No. 85-388, 64 Rad. Reg. 2d (P&F) 1391 (1988), *recon. denied*, *Fourth Order on Reconsideration*, 4 FCC Rcd 4464 (1989), the Commission amended Section 22.917 of the Rules (Demonstration of Financial Qualifications) by adding subsection (c) for rural service areas. Subsection (c) was added to prevent the filing of speculative applications by requiring non-wireline applicants to demonstrate that they have funds available or that they have received a firm financial commitment from a lender to provide the necessary funds. In the *Fourth Report and Order*, at paragraph 2, the Commission stated clearly its desire to maintain the integrity of its licensing processes by limiting eligibility for RSA applicants to those who sincerely intend, and are actually able to provide, high quality cellular service. Demonstration of a firm financial commitment serves as one indicia of a sincere intention to construct and operate the proposed cellular system.

5. Section 22.917(c)(5) of the Commission's Rules, provides, in pertinent part, that "[T]he firm financial commitment . . . shall contain a statement that the lender - (i) has examined the financial condition of the applicant including audited financial statements where applicable, and has determined that the applicant is creditworthy; (ii) . . . has examined the financial viability of each RSA proposal for which the applicant intends to use the commitment; (iii) . . . is committed to providing a sum certain to the particular applicant; (iv) . . . lender's willingness to enter into the commitment is based solely on its relationship with the applicant; and (v) that the commitment is not in any way guaranteed by any entity other than the applicant." First National's letter to Randolph meets each of the requirements of 22.917(c)(5).

6. First National's letter explicitly states that the bank has reviewed the estimated cost for each of Randolph's RSA applications, and that the bank has reviewed the personal financial condition of Mr. Murray. Based upon this financial data, the bank states in its letter that it is issuing a firm financial commitment to lend to Randolph the full amount necessary, up to $1,000,000.00, to finance any one of the RSA applications for which Randolph has applied. Sunshine's sole contention is that Randolph's

application should have contained a balance sheet and a certified audited financial statement of Mr. Murray since he may at some future date have to provide additional collateral if Randolph is to continue to draw upon the loan amount. We disagree with Sunshine's argument that, because of this additional collateral contingency, the applicant is relying on personal finances, rather than the bank loan, to demonstrate applicant's financial ability to construct and operate the proposed system. A review of the application and the firm financial commitment letter demonstrate that the applicant intends to finance construction and operation with the line of credit provided by the bank. The main collateral for the loan is the assets of the cellular system and all equity interest in Randolph. The contingency clause simply permits the bank, at its option, to require one partner of the applicant to provide additional collateral to support the loan at some unspecified time after the application is filed. As such, the existence of this hypothetical contingency cannot serve to undermine the fact that the bank has provided a firm financial commitment to the applicant at the time the application was filed.[6]

7. Furthermore, the bank letter demonstrates that the bank has already satisfied itself of Mr. Murray's ability to provide the additional collateral, if requested, and therefore, the bank's commitment is firm and unconditional. In light of this evidence, we find that the letter constituted a firm financial commitment from First National, and that the bank and not Mr. Murray is providing the finances for the proposed system.[7] Accordingly, we reject Sunshine's argument that Randolph was required to comply with Section 22.917(c)(6) of the Commission's Rules which provides the firm financial commitment requirements for non-wireline applicants intending to rely on personal or internal resources.[8]

IV. CONCLUSION AND ORDERING PARAGRAPHS

8. After carefully reviewing the facts and circumstances in the record before us, we grant the application of Randolph Cellular Limited Partnership. Further, we find that Randolph Cellular Limited Partnership has been found to be legally, financially and technically qualified to construct and operate the requested facilities.

9. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules, that the application of Randolph Cellular Limited Partnership, File No. 10011-CL-P-336-A-88, IS GRANTED. This authorization does not include the right to any interference protection in any areas outside the California 1-Del Norte RSA and is also conditioned upon coordinating with the current or future licensee(s) in the areas outside the RSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells or pull back its 39 dBu contours to eliminate any interference due to an extension.

10. IT IS FURTHER ORDERED that the petition to deny filed by Sunshine Cellular IS DENIED.

11. IT IS FURTHER ORDERED that all non-wireline cellular applications in the Del Norte, California RSA, other than the application of Randolph Cellular Limited Partnership, ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Public Notice, Report No. CL-89-89 (February 16, 1989).

[2] Paragraph 5 of the bank letter states:

> In addition to the foregoing, as one of the General Partners of Randolph Cellular Limited Partnership, James Murray (the "Guarantor") agrees to personally guarantee, and if requested to do so, to execute both prior and subsequent to funding this loan such standard form pledge, hypothecation, assignment, mortgage or other security agreements as the Bank and our correspondent banks may reasonably require in order to provide additional collateral for the loan, (which collateral shall not include the construction or operating authorization for the system) having value up to no more than 150% of the maximum amount to be advanced pursuant to the loan agreement.

[3] Mr. Sullivan is a senior vice president at First National Bank of Maryland. He is in charge of the Communications Lending Division and the person who signed the firm financial commitment letter to Randolph.

[4] Public Notice, Report No. CL-89-102 (March 13, 1989).

[5] Public Notice, Report No. CL-89-135 (April 27, 1989).

[6] This type of hypothetical future contingency is readily distinguishable from a present contingency which is unsatisfied at the time the application is filed. In the latter case, the commitment does not satisfy the firm financial commitment rule since the applicant has not satisfied the contingency at the time the application is filed. *See Progressive Cellular*, 4 FCC Rcd 5254 (Com. Car. Bur., 1989). The instant contingency, in contrast, is not unsatisfied because the bank has not requested the additional collateral.

[7] Similarly, in the California - 6 (Mono) RSA and the Nevada -1 (Humboldt) RSA, the MSD staff concluded that the letter issued by First National in those cases and containing the identical collateral requirement provision as in this case constituted a firm financial commitment.

[8] Finally, we note that First National states that it will not invoke the additional collateral provision for the Del Norte market. This fact is not critical to our decision. What is important is our finding that the letter as submitted constitutes a firm financial commitment to Randolph at the time the application is filed in compliance with our rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WASHINGTON RSA NO. 8 LIMITED PARTNERSHIP — File No. 10064-CL-P-700-B-88

For a construction permit to establish a new cellular system to operate on frequency block B in the Domestic Public Cellular Radio Telecommunications Service to serve the Washington 8 - Whitman Rural Service Area.

MEMORANDUM OPINION AND ORDER

Adopted: July 12, 1989; Released: July 31, 1989

By the Chief, Mobile Services Division:

1. Under consideration is a request for waiver of the anti-alienation provisions of Section 22.922 of the Commission's Rules filed by Washington RSA No. 8 Limited Partnership (Washington RSA No. 8 LP) in regard to the captioned application.

2. On November 9, 1988, the Commission announced Telephone Utilities of Washington, Inc. (TUW) as the lottery winner for the wireline frequency block in Rural Service Area (RSA) market number 700, Washington 8 - Whitman (Washington 8 RSA). On November 28, 1988, TUW and Inland Telephone Company (Inland Telco) reported to the Commission that a pre-lottery partial settlement had been reached among several wireline applicants for the Washington 8 RSA. The partial settlement was entered into by TUW, Inland Telco, St. John Cooperative Telephone & Telegraph (St. John), Pioneer Telephone Company (Pioneer), and U.S. West NewVector Group, Inc. (NewVector), which sought to form a partnership which would become the wireline cellular licensee in the Washington 8 RSA. On December 14, 1988, TUW filed an amendment pursuant to Section 1.65 of the Commission's Rules to substitute the Washington RSA No. 8 LP, the settlement entity, as the applicant. Inland Telco was designated the general partner with a 20% interest and the other partners, including TUW, were identified as limited partners, each with a 20% interest. Submitting that the partnership as formed constituted a substantial change in beneficial ownership or control and therefore a major amendment under Section 22.23 (c)(4), TUW requested pursuant to Sections 22.23 (g)(3) and (g)(4) of the Rules an exemption from the "cut-off" rule of Section 22.31.[1]

3. On February 13, 1989, the Washington RSA No. 8 LP filed a "Further Section 1.65 Amendment" containing the executed partnership agreement. The partnership also requested a waiver of Section 22.922 of the Commission's Rules to substitute Inland Cellular Telephone Company (Inland Cell) for Inland Telco as the general partner with a 20% ownership interest. The partnership reports that like Inland Telco, Inland Cell is a wholly-owned subsidiary of Western Elite Incorporated Services (Western Elite). Washington RSA No. 8 LP submits that because the change in ownership from the Inland Telco subsidiary to the Inland Cell subsidiary of Western Elite does not involve a substantial change in beneficial ownership or control, the amendment to the captioned application is a "minor" one under Section 22.23 (c) of the rules.

4. Because of this latter transfer from Inland Telco to Inland Cell, on February 13, 1989, Washington RSA No. 8 LP filed a request for a waiver of Section 22.922 of the Commission's Rules. The Commission announced this waiver request in a public notice.[2]

5. Section 22.922 prohibits the alienation of any interest in an RSA application prior to the grant of a construction authorization. Accordingly, the above-referenced transfer of Inland Telco's interest in the captioned application for Market 700 on the wireline frequency block constitutes a technical violation of Section 22.922. Section 22.922 was adopted to minimize speculation in applications and to eliminate any unnecessary delays in the implementation of service to the public. *See Amendment of the Commission's Rules for Rural Cellular Service, Third Report and Order*, 4 FCC Rcd 2440 (1988). As for the instant *pro forma* transfer, the circumstances of the filing of TUW's application does not evidence that the application was filed with the intent to speculate in RSA applications. The transfer from Inland Telco to Inland Cell is *pro forma* because the transfer was between two wholly owned subsidiaries of the same parent corporation and did not result in any change in control in the Washington RSA No. 8 LP. Thus, we conclude that the transfer of ownership in this instance will not thwart the objectives the Commission wanted to achieve when it adopted the anti-alienation rule.[3] Moreover, we find that approval of the waiver will not delay service to the public. Therefore, in the circumstances of this case, we hereby waive the anti-alienation provisions of Section 22.922 of the Commission's Rules with regard to the *pro forma* change in the ownership share of the application from Inland Telco to Inland Cell.

6. Accordingly, IT IS ORDERED that the request for waiver of Section 22.922 of the Commission's rules, filed by Washington RSA No. 8 Limited Partnership in regard to application of Washington RSA No. 8 Limited Partnership, File No. 10064-CL-P-700-B-88, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Such an exemption from Section 22.31 is necessary if the subject application undergoes a substantial change in ownership pursuant to Section 22.23 (c)(4) of the Rules and therefore would be treated as a newly filed application pursuant to Section 22.23 (g) of the Rules.

Requests for Extension of Time to complete the partnership agreement were also filed December 14, 1988 and January 13, 1989, both of which were granted.

[2] Public Notice, Report No. 89-143 (released May 3, 1989).

[3] With respect to TUW's request for exemption from the cut-off rules, partial settlements among wireline applicants are permitted in RSAs pursuant to the Third Report and Order, 4 FCC Rcd at 2442. We find that TUW has complied with the procedures for filing partial settlement agreements, Public Notice, Report No. CL-89-26 (released November 9, 1988). Because the amendment to TUW's application falls within the terms of Section 22.23 (g)(4), TUW is automatically exempt from the cut-off rule. Therefore, it was not necessary for TUW to request an exemption.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-229
Phase I
Phase II

In the Matter of

Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and

Policy and Rules Concerning Rates for Competitive Common Carrier Service and Facilities Authorizations Thereof

Communications Protocols under Sections 64.702 of the Commission's Rules and Regulations

MEMORANDUM OPINION AND ORDER ON FURTHER RECONSIDERATION AND SECOND FURTHER RECONSIDERATION

Adopted: July 6, 1989; Released: August 1, 1989

By the Commission: Commissioner Dennis concurring in part and dissenting in part and issuing a separate statement.

I. INTRODUCTION

1. Two parties, CONAP and ATSI,[1] have filed petitions for reconsideration of various aspects of the *Phase I Further Reconsideration* [2] and the *Phase II Reconsideration* [3] of the *Computer III* proceeding.[4] The *Phase I Further Reconsideration*, among other things, reaffirmed that our pricing requirements for Comparably Efficient Interconnection (CEI) and Open Network Architecture (ONA) do not mandate that distance-sensitive transmission functions be priced differently for CEI/ONA purposes than the same or substantially identical functions are priced in generally applicable tariffs.[5] While reaffirming that BOCs that collocate their enhanced and basic service facilities must minimize the transmission costs incurred by other enhanced service providers (ESPs) that connect with the BOCs' basic service facilities, we clarified that multiplexing those connections to aggregate traffic is not the only acceptable cost reduction technique. Instead, a BOC may satisfy this requirement by charging the same transmission rates to all ESPs, including its own collocated enhanced service operations.[6] The *Phase II Reconsideration*, among other things, declined to modify our CPNI rules so as to require the BOCs to deny access by their enhanced service personnel to customer proprietary network information (CPNI) absent prior authorization from customers.[7] We stated that we expected the BOCs to take special care to protect the CPNI of customers, especially ESPs, that request restricted treatment of their CPNI.[8] We also added a number of provisions to our CPNI rules to facilitate users' ability to limit access to their CPNI.[9]

2. We deny CONAP's requests that we reconsider our "parity pricing" policies adopted in the *Phase I Further Reconsideration*. We also dismiss ATSI's petition for reconsideration of our existing rules for BOC access to CPNI, as modified in the *Phase II Reconsideration*.

II. RECONSIDERATION ISSUES

A. *CEI/ONA Pricing*

1. *BOC Use of Parity Pricing Option*

3. The *Phase I Order* established a set of pricing requirements for CEI and ONA that permitted, but did not require, AT&T and the BOCs to charge for transmission services provided to ESPs on a distance-sensitive basis.[10] That order also established nine "CEI parameters" that define specific ways in which a BOC must ensure that the basic services used by its enhanced service operations are available to other ESPs in an equally efficient manner.[11] The *Phase I Order* declined to require the BOCs and AT&T to provide collocation opportunities to ESPs; instead, as one of the nine CEI parameters for "equal access" by ESPs, it required these carriers to minimize transmission costs for ESPs, through such techniques as loop or trunk multiplexing.[12] After the *Phase I Reconsideration* affirmed the CEI/ONA pricing requirements generally, the *Phase II Reconsideration* held that BOCs could satisfy the minimization of transmission costs parameter for enhanced protocol processing through price parity – that is, by charging themselves the same rates that they charge others.[13] Finally, the *Phase I Further Reconsideration* applied this "price parity" option to minimizing transmission costs for enhanced services other than protocol processing.[14] It also reaffirmed that our CEI/ONA pricing requirements do not mandate that distance-sensitive transmission functions be priced differently for CEI/ONA purposes than the same or identical functions are priced in generally applicable interstate tariffs.[15]

a. *Positions of the Parties*

4. CONAP petitions us to reconsider our use of parity pricing for ONA and CEI transmission services.[16] CONAP argues that permitting carriers to use price parity to minimize transmission costs of other ESPs is a "fundamental, unexplained and unjustified departure from a previously clearly articulated Commission requirement for the pricing of ONA and CEI transmission services."[17]

5. CONAP asserts that the *Phase I Order* rejected price averaging as a pricing method to reflect the distance-sensitive costs of dedicated transmission facilities.[18] CONAP adds that the *Phase I Reconsideration* rejected proposals for a mandatory price averaging rule that would require equal rates for all ESPs (including a BOC's enhanced service operations) within either a three or five mile band, which it describes as "virtual collocation."[19] CONAP contends that our failure to articulate either a factual basis or reasoned analysis for these actions, or an explanation of why parity pricing would serve the public

interest in contrast to "virtual collocation," is an arbitrary and capricious decision that is unlawful under the Administrative Procedure Act.[20]

6. CONAP further argues that we have not addressed the anticompetitive aspects of parity pricing. CONAP complains that "because the [BOCs] would be free if their plans are approved to set prices at any level they deem fit, regardless of the cost of providing the service, ONA pricing will remain essentially monopolistic . . . ."[21] CONAP asserts that if a BOC overprices ONA services to itself, the BOC will suffer "no financial consequence," in contrast to competing ESPs, for which overpricing "does have a financial impact." Accordingly, the BOC is in a position to exercise market power to limit entry into the enhanced services market, while remaining free to "influence the price at which its competitors must sell their services in order to recover the (excessive) ONA prices they would be required to pay to the BOC."[22] CONAP argues that price parity allows the BOCs to engage in a form of "predatory pricing," which it asserts closely resembles a classic "price squeeze" between "wholesale" and "resale" prices.[23]

7. IDCMA shares CONAP's concern that the parity pricing option might enable the BOCs to set artificially high prices for the basic services necessary for ESPs. IDCMA thus supports CONAP's contention that cost-based pricing should be an essential element of the pricing for CEI and ONA.[24]

8. Dun & Bradstreet urges us to clarify whether the parity pricing requirement actually requires that prices be reasonably related to costs of transmission facilities. Dun & Bradstreet contends that if prices are not based on cost, parity pricing would completely sacrifice ONA's efficiency goal.[25]

9. Telenet asks us to clarify our position on parity pricing, but disagrees with CONAP's contentions that we have abandoned the principle of cost-based pricing or that we envision that price parity alone eliminates the ability of the BOCs to engage in anticompetitive pricing strategies.[26]

10. Each of the BOCs opposes CONAP's petition. Ameritech, SWBT, and BellSouth state that CONAP incorrectly represents the requirements of our prior rulings. These BOCs assert that we never "rejected" the use of rate averaging, and that we never found the use of virtual collocation to be "not acceptable". SWBT notes that, while we acknowledged the benefits of distance-sensitive access link pricing, we did not mandate such pricing, nor did we prohibit the use of price averaging or "virtual collocation" for CEI or ONA basic services.[27]

11. Several BOCs dispute CONAP's claim that the use of price parity as a means to minimize transmission costs is anticompetitive. Ameritech and BellSouth oppose CONAP's contention that parity pricing would result in a "price squeeze" or "predatory pricing."[28] Other BOCs list a number of factors that they claim currently exist to restrict any potential for anticompetitive pricing under price parity, including (i) state regulatory oversight of the tariffing process; (ii) the competitive disadvantage that a BOC's enhanced services would suffer from monopolistically priced ONA basic services, because of pricing parity requirements and because BOC stockholders would not allow the enhanced service operation to be run at a loss; and (iii) recognition that such practices would violate the antitrust laws.[29]

12. Several BOCs also contend that CONAP is incorrect in its claim that we "arbitrarily" and "capriciously" departed from our prior policies in approving price parity as a means of minimizing transmission costs for ESPs. Ameritech, SWBT, and BellSouth state that price parity is fully consistent with our goals of facilitating equitable competition between BOCs and ESPs by promoting nondiscrimination in pricing; avoiding perverse economic incentives for ESPs by applying parity pricing only for those facilities within a BOC's control; encouraging the use of basic services now available in existing tariffs; and promoting development of more efficient means of transmission.[30]

13. CONAP replies that none of the BOCs respond to CONAP's claim that "non-cost-based" parity pricing is inconsistent with promoting economic efficiency and the availability of information services. CONAP adds that neither the BOCs nor we explain why "cost-based" virtual collocation is not preferable to "non-cost-based" price parity to promote the dual goals of efficient provision of enhanced services and the creation of a fair, competitive enhanced service market.[31] CONAP also opposes the BOCs' arguments that parity pricing is not anticompetitive, restating its earlier positions and asserting that: (i) our special access rate investigation[32] and the lack of any regulation by some states of the relevant basic services demonstrate that current forms of rate-of-return regulation do not guarantee cost-based transmission service; and (ii) BOC shareholders, rather than ratepayers, benefit from overpricing in the long term. Finally, CONAP attacks Ameritech's economic arguments that parity pricing is not anticompetitive, using its own economic analysis in purporting to show the anticompetitive potential that exists with parity pricing.[33]

b. ***Discussion***

14. It appears doubtful that CONAP is entitled to seek further reconsideration. Such petitions usually must relate to some aspect of the decision that has been modified in the reconsideration decision.[34] While CONAP styles its petition as one seeking reconsideration of our acceptance of price parity for CEI purposes in our recent *Phase I Further Reconsideration*, it makes basically the same arguments concerning the effect of *Computer III* on the pricing of basic services that it made in the last reconsideration round in this proceeding. There, as here, CONAP contended that in the initial *Phase I Order*, we had created a new, "cost-based pricing" requirement for basic transmission services and that our clarification in subsequent reconsideration orders that we intended to rely on normal tariffing rules and processes for such services represented an improper and unwise reversal of policy.[35] We rejected those arguments in the *Phase I Further Reconsideration*.[36] Although we have decided to address CONAP's petition on the merits in this order, we do so principally to clarify the role of price parity in our *Computer III* framework, which CONAP's arguments tend to mischaracterize. Nevertheless, we caution parties generally that repetitious arguments in reconsideration petitions, particularly in lengthy and complex Rule Makings such as this, are highly disfavored and subject to dismissal.[37]

15. CONAP's complaints about price parity appear to be based on a misunderstanding of our *Computer III* requirements for the pricing of basic services, our CEI parameters, and the relationship of those specific requirements and parameters to our general ratemaking and

tariffing rules and practices, which are designed to produce just and reasonable rates for all interstate basic services, including those purchased by ESPs. CONAP seems to argue that our use of a price parity standard for CEI purposes changes pricing and tariffing rules established in *Computer III* for the basic services that BOCs use for CEI and ONA. As explained below, that assertion is incorrect. CONAP's petition also argues on policy grounds that a price parity standard should not be used to satisfy the BOCs' obligation to minimize transmission costs because price parity permits the BOCs to engage in anticompetitive pricing for basic services. That argument is not persuasive. CONAP also makes other, peripheral claims that either are not relevant to this proceeding or are being addressed in other proceedings.[38] Accordingly, we deny its petition.

16. CONAP incorrectly asserts that the price parity policy departs from our previously articulated requirements for the pricing of ONA and CEI transmission services.[39] CONAP claims that *Computer III* rejected price averaging and virtual collocation as pricing techniques for distance-sensitive transmission facilities, while requiring "cost-based" pricing for such facilities.[40] To the contrary, while the *Phase I Order* permitted BOCs to charge distance-sensitive rates for transmission facilities, that order did not foreclose a different pricing scheme,[41] which could include some sort of averaging, banding, or "virtual collocation," as CONAP describes it. Although we noted that mandatory price averaging would not reflect the distance-sensitive costs of dedicated transmission facilities,[42] and discussed the economic benefits of distance-sensitive pricing, we did not require such pricing.[43] Since we required neither price averaging nor distance-sensitive pricing for transmission facilities, CONAP's factual premises are erroneous for its claim that we "arbitrarily and capriciously" departed from our prior rules in the *Phase I Further Reconsideration* and *Phase II Reconsideration*. Moreover, to the extent that CONAP supports distance-sensitive pricing for transmission, we note that such pricing for interstate transmission services is widely available in existing federal tariffs. To the extent that CONAP's arguments apply to intrastate transmission services, our authority over such services is, of course, limited, as we have noted in the *Phase I Reconsideration*.[44]

17. CONAP's apparent argument that a price parity standard somehow allows BOCs the freedom to "set prices at any level they deem fit" and thus charge monopolistic prices for transmission facilities[45] is way off the mark. "Price parity" is simply a way for the BOCs and AT&T to address adequately the specific "minimization-of-transmission-costs" CEI parameter.[46] It does not change our access charge requirements for the pricing of interstate services.

18. Price parity is fully consistent with our policy of promoting competition in the enhanced services market through nondiscriminatory pricing. As the *BOC ONA Order* notes, rates for federally tariffed ONA services, like those for other interstate basic services, must be related to costs.[47] That order further recognizes that, while price parity can be an important tool in preventing unreasonable discrimination in the rates that BOCs charge their competitors, it cannot alone ensure that those rates are set at levels that promote the efficient development of telecommunications-based industries.[48] Our access charge rules ensure that the rates charged by dominant carriers are just and reasonable and further the network efficiency, equity and other goals of the Act. Parties are free to raise pricing concerns in the pending *ONA/Part 69* proceeding, initiated to consider how best to integrate the ONA tariffing policies of the *BOC ONA Order* into the existing federal access charge rules.[49] Our earlier *Computer III* decisions stressed the importance of our existing federal ratemaking principles in the implementation of ONA, and expressly did not purport to modify currently applicable standards for the pricing of interstate ONA services.[50] We thus reiterate that existing ratemaking rules and principles apply to BOCs using price parity to minimize transmission facility costs. Anticompetitive practices or other unwarranted deviations from our tariffing practices will be identified and corrected in the normal tariff review and complaint process.[51]

19. Finally, it appears that price parity, as applied in the *BOC ONA Order*, largely meets the goals of CONAP's proposals for mandatory "virtual collocation" or "price averaging" within a specific mileage band. While we rejected such proposals in both the *Phase I Order* and the *Phase I Reconsideration* -- for example, for a mandatory three (or five) mile rule --we specified in the *BOC ONA Order* that in implementing price parity for transmission services priced on a distance-sensitive basis, BOCs should use a specific form of banded pricing.[52] However, CONAP also appears to argue that the parity pricing standard differs from "banded" pricing or "virtual collocation" in terms of whether it must be based on costs under our rules.[53] As noted above, our general federal tariffing principles require that, under any pricing scheme *(e.g.,* price parity, virtual collocation, or distance-sensitivity), rates charged by BOCs for interstate basic services must be related to costs. Given this fundamental tenet, we see no reason to reconsider our decision to permit price parity to serve as a satisfactory response to our minimization-of-transmission-costs CEI parameter.[54]

B. *Customer Proprietary Network Information*

1. *Prior Authorization Rule*

20. The *Phase II Order* established CPNI safeguards to protect the privacy of business users' CPNI; to ensure that a BOC could not identify a competing ESP's customers, either directly from the ESP's CPNI, or indirectly from the CPNI of the ESP's customers that obtain enhanced services through dedicated facilities.[55] Among other things, that order required each BOC to provide customers with the right to direct the BOC to (i) withhold a customer's CPNI from BOC enhanced service personnel; (ii) release a customer's CPNI to other ESPs; and (iii) notify multiline business customers annually of their CPNI rights.[56] The *Phase II Order* declined to impose on the BOCs a "prior authorization" rule for BOC use of CPNI, finding that such a requirement is unnecessary to protect customer interests and promote competition. We reasoned that the prior authorization rule is unnecessary because: (i) the most valuable information in marketing enhanced services is not CPNI, but comes directly from the customer, relates to its information processing needs, and is equally available to both BOCs and ESPs; (ii) many ESPs that perform data processing possess marketing information more valuable than CPNI; (iii) access to CPNI does not assure a BOC of success, since the BOC would be entering any enhanced service market with zero market share; and (iv) customers' knowledge that the en-

hanced services market is competitive will result in the customer contacting competing ESPs, even if a BOC makes an initial enhanced service solicitation.[57]

21. The *Phase II Reconsideration* again denied requests to adopt the prior authorization rule for the BOCs, stating that no party supporting such a change had offered any new arguments demonstrating that the existing CPNI rule should be replaced.[58] However, we did adopt three modifications to our existing rule proposed by the New York Clearing House Association and the Committee of Corporate Telecommunications Users (NYCHA/CCTU): (i) each BOC must enclose a response form with the CPNI notice; (ii) a customer's election to restrict its CPNI must remain valid unless and until the customer specifically revokes that choice; and (iii) the BOCs must accommodate requests for partial or temporary restriction of CPNI.[59] In addition, we required the BOCs to honor customer requests for restricted treatment of CPNI before the BOCs send notice of CPNI rights, to mitigate concerns about "inadvertent authorization by omission."[60] We required that BOC amendments to their ONA plans resolve potential ambiguities that may arise over whether a particular item of CPNI should be attributed to the ESP who requests that access to its CPNI be restricted, or to a customer of that ESP. We also required the BOCs to describe more fully what constitutes the CPNI that they will restrict pursuant to requests for confidentiality from various types of ESPs.[61]

a. *Positions of the Parties*

22. ATSI petitions us to revise our CPNI rules to require BOCs to obtain a customer's prior authorization before permitting their enhanced services marketing personnel to access that customer's CPNI. ATSI claims that, even as modified in the *Phase II Reconsideration*, the current CPNI rule denies ATSI's members the ability to protect their own competitively sensitive information, is discriminatory and anticompetitive, and violates users' legitimate privacy interests.[62] ATSI argues that the BOCs' plan to classify a wide array of information as CPNI, including messaging-related features such as call forwarding, provide their enhanced service marketing personnel with competitive advantages over competing ESPs in identifying potential customers, designing specialized marketing approaches, and determining a potential customer's creditworthiness. ATSI further argues that BOCs can misuse sensitive information about ESP operations that is associated with the CPNI of an ESP's customers, not with the CPNI of the ESP itself.[63] ATSI also argues that the modifications to the CPNI rule do not adequately protect users' legitimate privacy interests,[64] claiming that even if BOC notification letters adequately described the information at issue, many customers might not comprehend or might ignore these letters, creating an incorrect assumption that those customers do not desire to restrict access to their CPNI.[65]

23. Telenet supports ATSI's petition. Telenet argues that the current CPNI rule represents an anticompetitive "double standard," in which competing ESPs are required to obtain prior customer authorization to acquire CPNI, but a BOC's enhanced service is accorded access to CPNI unless the customer requests that it be restricted.[66]

24. All of the BOCs and AT&T oppose ATSI's petition, claiming that the petition is procedurally improper because it offers the same arguments in favor of the prior authorization rule that we rejected in the *Phase II Order* and the *Phase II Reconsideration*.[67] AT&T and Ameritech state that we were correct in refusing to impose a prior authorization requirement, since such a requirement would impose a limited form of structural separation between a carrier's enhanced service and network service operations, reducing the benefits and efficiencies of joint marketing that we sought to promote in adopting the *Computer III* nonstructural safeguards.[68]

25. Several BOCs cite other factors that we considered in the *Phase II Order* and the *Phase II Reconsideration*[69] to bolster their assertions that the current CPNI rule should remain in effect. SWBT states that ATSI's specific concern about BOC misuse of call forwarding features to identify customers of competitors is baseless because a customer of call forwarding does not necessarily also subscribe to any ESP's voice messaging service, making it extraordinarily expensive to identify a target market of existing ESP customers.[70] Most of the BOCs and AT&T also assert that the CPNI rules do not violate customers' legitimate privacy interests.[71]

26. ATSI replies that its petition is procedurally proper since it concerns the effects of the CPNI rule as modified by the *Phase II Reconsideration*, not as initially formulated.[72] ATSI's reply also asserts that the BOCs' opposition to a prior authorization rule provides conclusive evidence that the current CPNI rule confers a substantial competitive advantage on them.[73]

b. *Discussion*

27. We dismiss ATSI's petition as repetitious. The earlier orders in this proceeding fully addressed the arguments that ATSI presents in this round. The *Phase II Order* analyzed the major policy issues that ATSI raises regarding the prior authorization rule, and declined to adopt such a requirement. The *Phase II Reconsideration* affirmed our decision not to impose a prior authorization rule on the BOCs. ATSI submitted a response in that reconsideration proceeding that raised essentially the same arguments that it now raises in its petition.[74] The *Phase II Reconsideration* fully addressed, and rejected, those and other arguments that a prior authorization rule should be adopted. Although ATSI argues generally that the modifications to our CPNI rules adopted in the *Phase II Reconsideration* are inadequate replacements for a prior authorization rule, it adduces no new evidence and cites no changed circumstances to support its claims. Nor does it propose any changes to those modifications. Instead, it simply contends generally that those modifications are inadequate, and repeats arguments we have already considered.

III. ORDERING CLAUSE

28. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, 218, and 405, and 5 U.S.C. § 553, CONAP's Petition for Reconsideration IS DENIED, and ATSI's Petition for Reconsideration is DISMISSED, as discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

APPENDIX A

PARTIES FILING PETITIONS FOR RECONSIDERATION

1. Association of Telemessaging Services, International, Inc. (ATSI)

2. Coalition of Open Network Architecture Parties (CONAP)

PARTIES FILING RESPONSES

1. Ameritech Operating Companies (Ameritech)

2. American Telephone and Telegraph Company (AT&T)

3. Bell Atlantic Telephone Companies (Bell Atlantic)

4. BellSouth Corporation, South Central Bell Telephone, and Southern Bell Telephone and Telegraph Company (BellSouth)

5. Dun & Bradstreet

6. Independent Data Communications Manufacturers Association, Inc. (IDCMA)

7. Telenet Communications Corporation (Telenet)

8. New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)

9. Pacific Bell, Nevada Bell, Pactel Communications Companies, and Pacific Telesis Group (Pactel)

10. Southwestern Bell Telephone Company (SWBT)

11. US West,Inc. (US West)

PARTIES FILING REPLIES

1. ATSI

2. CONAP

3. BellSouth

FOOTNOTES

[1] Hereinafter, we describe a petition for reconsideration as a "petition," a pleading filed in response or opposition to a petition as a "response," and a pleading filed in reply to a response as a "reply." Parties filing petitions, responses, and replies are listed in Appendix A. We use the abbreviations listed in that Appendix in this Order.

[2] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Memorandum Opinion and Order on Further Reconsideration*, 3 FCC Rcd 1135 (1988).

[3] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Memorandum Opinion and Order on Reconsideration*, 3 FCC Rcd 1150 (1988).

[4] *See also* Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*); *Report and Order*, 2 FCC Rcd 3072 (*Phase II Order*).

[5] *Phase I Further Reconsideration*, 3 FCC Rcd at 1140-41, paras. 43-46. *See also Phase II Reconsideration* at 1156-57, paras. 46-49 (we retained the same pricing treatment for protocol processing as that applicable to all other enhanced services).

[6] *Phase I Further Reconsideration* at 1141, para. 46; *see also Phase II Reconsideration* at 1155, para. 49.

[7] *Id.* at 1162, para. 96. In this order, we describe this authorization requirement as the "prior authorization rule."

[8] *Id.* at 1163, para. 99.

[9] *Id.* at 1163, para. 105.

[10] *Phase I Order*, 104 FCC 2d at 1048-49, paras. 174-175.

[11] The nine CEI parameters are: Interface Functionality; Unbundling; Resale; Technical Characteristics; Installation, Maintenance, and Repair; End User Access; CEI Availability; Minimization of Transmission Costs; and CEI Recipients. *Phase I Order*, 104 FCC 2d at 1039-43, paras. 154-167.

[12] *Id.* at 1042, para. 164.

[13] *Phase II Reconsideration*, 3 FCC Rcd at 1157, para. 49.

[14] *Phase I Further Reconsideration* at 1141, para. 46.

[15] *Id.* at 1140-41, paras. 43-46.

[16] CONAP Petition at 2-20.

[17] *Id.* at 4.

[18] *Id.* at 7.

[19] *Id.* at 8-9. CONAP also describes virtual collocation as a "form of rate averaging." *Id.* at 2, 10.

[20] *Id.* at 9-12.

[21] *Id.* at 13.

[22] *Id.* at 18-19.

[23] *Id.* at 16. CONAP contends that the "price caps" regime that we currently are considering in a separate proceeding would create an even greater potential for anticompetitive activity by the BOCs than traditional rate-of-return regulation. *Id.* at 18, *citing* Policy and Rules Concerning Rates for Dominant Carriers, *Further Notice of Proposed Rule Making*, 3 FCC Rcd 3195 (1988) (*Price Caps Further Notice*).

[24] IDCMA Comments at 2-4. IDCMA further proposes that, in the absence of a nondiscriminatory collocation requirement, which it describes as the most desirable option, the BOCs should implement parity pricing by being "required to charge their colocated enhanced services operations and those noncolocated operations of ESPs an equal rate based on the average cost of providing local loops *and* the average cost of providing cross-office connections." *Id.* at 7 (emphasis in original). IDCMA adds that these averages would be determined from actual costs. *Id.* at n.12.

[25] Dun & Bradstreet Response at 4-6. Dun & Bradstreet also argues that recent BOC refusals to provide collocation erode the bases for our earlier decision not to mandate averaging of charges for transmission facilities, and that now the BOCs should be required to offer some form of price "banding" or "averaging" for basic ONA and CEI services. *Id.* at 6-9.

[26] Telenet Response at 3-5.

[27] Ameritech Response at 4; SWBT Response at 11-13; BellSouth Response at 4-10. NYNEX, US West, and Pactel also argue that CONAP's petition is procedurally improper. NYNEX asserts that because the issues presented in CONAP's petition relate to ONA, we should decide them in the ONA proceeding. NYNEX Response at 4-5. Pactel states that CONAP's arguments are more appropriate for comments on the ONA plans, and that, in any case, CONAP's petition raises identical arguments to those it has raised in prior proceedings and should thus be denied as repetitive. Pactel Response at 5. US West argues that we have insufficient jurisdiction over intrastate ratemaking to control state tariffing practice in the way CONAP seems to desire, and that this is not the appropriate proceeding to consider restructuring interstate access. US West Response at 12.

[28] Ameritech Response at 8-14; BellSouth Response at 10-12. Ameritech also asserts that CONAP is wrong in its claim that BOCs would have the incentive and ability to charge artificially high rates for access if price caps regulation replaces rate-of-return regulation. Ameritech presents an economic analysis that, it claims, shows that even if price cap regulation were to permit monopoly pricing of access, no anticompetitive consequences would occur.

[29] *See* Bell Atlantic Response at 3-4 & n.6; Pactel Response at 6 & n.14; SWBT Response at 14-15.

[30] Ameritech Response at 5-7; SWBT Response at 13-14; BellSouth Response at 4-7.

[31] CONAP Reply at 3-5. CONAP also contends that its petition for reconsideration is procedurally proper, claiming that our rules do not limit petitions for reconsideration of Commission decisions in Rule Makings to petitions that are predicated on facts not previously presented to the Commission. CONAP explains that because it is arguing that our acceptance of parity pricing is an error of law and mistaken policy, its petition is within the Commission's rules. *Id.* at 2-3.

[32] *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, *Memorandum Opinion and Order*, FCC 88-321 (released Dec. 1, 1988) *(Special Access Investigation Order), recon pending.*

[33] CONAP Reply at 6-9. BellSouth also filed a reply.

[34] *See* 47 C.F.R. § 1.429(i).

[35] *See* CONAP Petition for Further Reconsideration of *Phase I Reconsideration*, filed July 10, 1987.

[36] *See Phase I Further Reconsideration* at 1140-41, paras. 43-46.

[37] *See infra* para. 27.

[38] We do not address in this order CONAP's concerns about allegedly anticompetitive effects of price cap regulation on ONA services. In the price cap Rule Making, we are considering whether this approach to tariff regulation would produce greater benefits than rate-of-return regulation in terms of network efficiency, lower rates, and service quality. These goals are fully consistent with our goals in this proceeding. We also note that the most recent notice of proposed Rule Making in that proceeding requests comment on the relationship between price caps and ONA for the BOCs. *See* Policy and Rules Concerning Rates for Dominant Carriers, *Report and Order and Second Further Notice of Proposed Rule Making*, 4 FCC Rcd 2873, 3287, para. 865 (1989). Also, we do not address CONAP's concerns about basic services detariffed at the state level. We have established procedures that address such services for purposes of our ONA/CEI policies, *see Phase I Reconsideration*, 2 FCC Rcd at 3054, para. 136, but recognize our limited jurisdiction over such services.

[39] CONAP Petition at 4.

[40] *Id.* at 7-8.

[41] *Phase I Order*, 104 FCC 2d at 1048, para. 174.

[42] *Id.* at 1047, para. 172.

[43] *Id.* at 1048-49, para. 175.

[44] 2 FCC Rcd at 3054-55, paras. 133-136.

[45] CONAP Petition at 13. *See generally id.* at 13-19. The BOCs argue that, even apart from regulatory review of their rates, they could not successfully price transmission services anticompetitively. Ameritech offers an economic analysis to support its position that, while containing many assumptions about market conditions, appears to counter many of CONAP's claims, which rely heavily on a different set of assumptions.

[46] The minimization-of-transmission-costs requirement is only invoked when a BOC elects to (i) collocate its enhanced service facilities with its basic services facilities, and (ii) take advantage of this collocation to charge itself a "short-wire" price for access that is lower than the prices it charges its non-collocated competitors. If a BOC does not collocate its enhanced and basic facilities, there is no additional CEI requirement to take special steps to minimize competitors' transmission costs. *See Phase II Reconsideration* at 3 FCC Rcd at 1155, paras. 32-34; *see also Phase I Order*, 104 FCC 2d at 1042-43, para. 166 n. 219. Similarly, if a BOC does collocate its enhanced and basic facilities, but charges itself the same rate for access that it charges non-collocated enhanced service competitors, there also are no further measures it must take to minimize other ESPs' transmission costs. If, on the other hand, a BOC is charging itself a unique, "collocated transmission" rate, it is required to take reasonable steps to provide its ESP competitors with transmission services in a way that reduces the differential between the costs it incurs and those incurred by those competitors. Thus, for the purpose of this particular requirement, equality of treatment in transmission costs, while not required, is fully satisfactory. Of course, nondiscrimination is not our exclusive goal in the broader ONA context. We also seek to encourage the efficient provision of enhanced services by enabling ESPs to purchase unbundled BSEs that should assist them in developing and offering services to the public in an economic and innovative fashion. *See Phase I Reconsideration* at 3050, para. 107.

[47] Filing and Review of Open Network Architecture Plans, *Memorandum Opinion and Order*, 4 FCC Rcd 1 (1988) *(BOC ONA Order)* at 84, para. 165 n. 326.

[48] *Id.*

[49] *See* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, *Notice of Proposed Rulemaking*, 4 FCC Rcd 3983 (1989).

[50] *Phase I Further Reconsideration*, 3 FCC Rcd at 1141, para. 44.

[51] CONAP briefly attacks our special access rate investigation, apparently as an example of allegedly improper tariff pricing. We do not resolve any controversies relating to existing tariff rates in this *Computer III* reconsideration proceeding. We have already addressed some such issues in the *Special Access Investigation Order*, and petitions for reconsideration of that order are currently pending. Our decisions in this proceeding are not inconsistent with those in the *Special Access Investigation Order*, but should not be interpreted as sanctioning or condemning pricing practices that are being, or may be, investigated in other proceedings. We note, however, that under the price parity approach, BOCs are precluded from charging competitors rates for ONA services different from those charged to their enhanced service operations. Parties may present evidence of particular instances of discrimination in the tariff review and complaint process. *See also Phase I Further Reconsideration*, 3 FCC Rcd at 1147 n. 72.

While CONAP also states in its reply that BOC shareholders, rather than ratepayers, will benefit in the long term from overpricing of ONA services, the hypothetical and speculative nature of this argument, and its unwarranted assumptions that improper overpricing will take place, cause us to reject it as a reason for changing our policies.

[52] *BOC ONA Order* at 86-88, paras. 166-171.

[53] *See* CONAP Petition at 10; CONAP Reply at 4-5.

[54] We reject Dun & Bradstreet's argument that the failure of BOCs to offer collocation opportunities to ESPs requires a change in our pricing or collocation policies. *See supra* note 25. We have not relied on the availability of such opportunities in developing our ONA rules, and, as stated in the *BOC ONA Order*, we see no reason, based on the BOCs' practices with respect to collocation or otherwise, to revisit these issues at this time.

[55] *Phase II Order*, 2 FCC Rcd at 3095, paras. 154-55.

[56] *Id.*at 3094-98, paras. 154-155, 162-165.

[57] *Id.*at 3094-95, para. 153.

[58] *Phase II Reconsideration* at 1162-63, paras. 96-99.

[59] *Id.*at paras. 101, 105-107.

[60] *Id.*at para. 108.

[61] *Id.*at para. 99.

[62] ATSI Petition at 2-4.

[63] ATSI is concerned, for example, that BOCs will use their knowledge of the "forwarded-to" number of an end user's call forwarding service to "lure away" competitors' most lucrative voice messaging customers. *Id.*at 6.

[64] *Id.*at 7-8.

[65] *Id.*at 7-9.

[66] Telenet Response at 6-7.

[67] AT&T Response at 2-4; Bell Atlantic Response at 5; Ameritech Response at 20; BellSouth Response at 13-15; Pactel Response at 3-4; SWBT Response at 2-3; US West Response at 3-5; NYNEX Response at 2-4.

[68] AT&T Response at 4-5; Ameritech Response at 21. *See also* Pactel Response at 3.

[69] Ameritech Response at 18, *citing Phase II Order* at 2 FCC Rcd at 3094-95, para. 153; *see also* BellSouth Response at 14, Ameritech Response at 17, *citing Phase II Reconsideration*, 3 FCC Rcd at 1162-63, para. 97. US West Response at 7, *citing Phase II Reconsideration*, 3 FCC Rcd at 1162-63, para. 97.

[70] SWBT Response at 6.

[71] BellSouth Response at 15-16. *See also* US West Response at 8-10; SWBT Response at 8-9; Ameritech Response at 20; AT&T Response at 3-4.

[72] ATSI Reply at 3-4.

[73] *Id.*at 5-8.

[74] *See* Comments of ATSI on Petitions for Reconsideration of *Phase II Order* (filed Aug. 5, 1987) at 5-9.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS CONCURRING IN PART AND DISSENTING IN PART

In Re: Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); Phase II Further Reconsideration

In concurring in this item, I write separately to stress that price parity is not a substitute for, or mutually exclusive with, cost-based pricing. CONAP asserts that price parity undermines the Commission's commitment to cost-based rates. We have endorsed price parity as a means of preventing the Bell Operating Companies ("BOCs") from discriminating against their enhanced service competitors. This decision does not signal any retreat from the principle that rates must reflect the underlying costs of providing service. The enhanced services market can flourish best if competitors have access to cost-based transmission services.

As to the customer proprietary network information (CPNI) portion of this item, I concur and, in part, dissent. These rules allow a BOC's enhanced services affiliate unrestricted access to the CPNI of those customers who do not request confidentiality. Opponents of these rules argue that this procedure will provide BOCs with a significant marketing advantage over the BOCs' enhanced service competitors, who must obtain a customer's prior authorization before they can gain access to such information. Opponents maintain that CPNI is a valuable marketing tool because it may provide insight into a customer's future needs for enhanced services.

When this Commission first considered the CPNI safeguard, the record provided little detail on the nature and competitive utility of a customer's basic service data. On the basis of that initial record, it did not appear that allowing BOCs direct access to a customer's CPNI would give the BOCs' enhanced service operations a meaningful marketing advantage.

The reconsideration proceedings, however, have provided additional information on the competitive importance of CPNI, and on the privacy concerns raised by our existing rule.[1] The record now shows that the BOCs have access to detailed information revealing the quantity, type, location, and usage patterns of basic services ordered by individual customers. The BOCs also know the credit history of their customers and the name of a corporate contact person. This information helps BOCs to target potential customers for their enhanced service offerings and to tailor marketing presentations to the needs of a particular subscriber. For example, BOCs can use this CPNI to predict the design, volume, and geographic coverage requirements of likely enhanced services customers. The BOCs' ability to gain access to this information without prior authorization could give their enhanced services affiliates a useful competitive edge.

Residential and single-line business customers are most likely to subscribe to services that are close to the core of the telephone business, such as voice storage and retrieval services. For this reason, our decision not to require prior authorization for residential and single-line business customers seems reasonable and I concur in this aspect of the order.

I take a different view, however, with respect to more sophisticated data-intensive business services such as credit card verification or data processing, which are distinct from traditional voice-based telephone services. The record now indicates that we could improve the CPNI safeguard by requiring all enhanced service providers--including the BOCs' enhanced service marketing personnel--to obtain authorization before using the CPNI of their multi-line business customers. This approach would apply the same CPNI rule to all enhanced service provider dealings with multi-line business customers, remov-

ing the marketing advantage the BOCs now enjoy. It would also maximize these customers' ability to control and protect their own proprietary network usage data. I, therefore, dissent from this decision to the extent that it does not require the BOCs' enhanced service affiliates to obtain prior authorization before gaining access to the CPNI of multi-line business customers.

FOOTNOTE FOR STATEMENT

[1] *See, e.g.,* Petition for Reconsideration of Association of Telemessaging Services, Inc., CC Docket No. 85-229 (Phase II) (filed April 18, 1988), at pp. 4-9.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-318

In the Matter of

Amendment of Section 73.202(b), RM-6692
Table of Allotments,
FM Broadcast Stations.
(Wincrest and Hondo, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 7, 1989; Released: August 1, 1989

By the Chief, Allocations Branch:

1. A petition for rule making has been filed by Jewel R. Morris (petitioner), proposing the allotment of Channel 253A to Windcrest, Texas, as that community's first local FM service. Petitioner also suggests the substitution of Channel 254A for vacant but applied for[1] Channel 253A at Hondo, Texas, in order to accomplish the allotment at Windcrest. Petitioner states an intention to apply for the channel, if allotted to Windcrest.

2. We believe the proposal warrants consideration. Channel 253A can be allotted to Windcrest in compliance with the Commission's minimum distance separation requirements with a site restriction, provided the channel substitution at Hondo is accomplished. A site restriction of 5.1 kilometers (3.2 miles) north of the community is necessary in order to protect Station KBOP-FM, Channel 252A, Pleasanton, Texas. Mexican concurrence is required since the communities are located within 320 kilometers (199 miles) of the U.S.-Mexican border.

3. If the Windcrest proposal is adopted, the applicant for Channel 253A at Hondo will be permitted to amend its application to specify Channel 254A, without loss of cut-off protection. Since it is possible that a construction permit may be issued to the Hondo applicant during the course of this proceeding, Commission policy requires that the ultimate permittee for Channel 253 at Windcrest, Texas, reimburse the Hondo permittee for costs incurred in changing its frequency to Channel 254A.

4. In view of the fact that Windcrest, Texas, could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Hondo, Texas	253A	254A
Windcrest, Texas	---	253A

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following: Radio Medina, Inc., 1605 Ave. K Box 447, Hondo, Texas 78861

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **September 22, 1989,** and reply comments on or before **October 10, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Jewel R. Morris
8619 Sagebrush Lane
San Antonio, TX 78217
(Petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Radio Medina, Inc., has an application pending for Channel 253A at Hondo, Texas (BPH-861215MB). Therefore, we shall serve the applicant with a copy of this *Notice*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-324

In the Matter of

Amendment of Section 73.202(b), RM-6774
Table of Allotments,
FM Broadcast Stations.
(Ebenezer, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 13, 1989; Released: August 1, 1989

By the Chief, Allocations Branch:

1. JimBar Enterprises (petitioner), has requested the allotment of FM Channel 280A to Ebenezer, Mississippi, as that community's first FM broadcast service. Petitioner provided an engineering study in support of the request and indicated its intention to file an application for the channel.

2. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several states and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. Ebenezer is not listed in the 1980 U.S. Census.[1] Therefore, petitioner should present the Commission with sufficient information to demonstrate that Ebenezer has the social, economic or cultural indicia to qualify it as a "community" for allotment purposes. *See Ansley, Alabama*, 46 FR 58688 (1981); *Cascade Village*, Colorado, 48 FR 19917 (1983); *Elwood, California*, 50 FR 13031 (1985).

3. We believe that petitioner's proposal to provide Ebenezer with it's first local service, should it ultimately be deemed a community, warrants further consideration. Therefore, we shall invite comments on the proposal to allot Channel 280A to Ebenezer.

4. A staff engineering analysis indicates that Channel 280A can be allotted to Ebenezer consistent with the minimum distance separation requirements of section 73.207(b) of the Commission's Rules, provided there is a site restriction 10.6 kilometers (6.6 miles) southwest of the Community.[2] The site restriction will prevent a conflict with station WCLD-FM, Channel 280A, Cleveland, Mississippi, and to Channel 281C2 (vacant) at Union, Mississippi.[3]

5. In view of the above, we believe it is appropriate to seek comments on the proposed amendment of the FM Table of Alloments, Section 73.202(b) of the Commission's Rules, with respect to Ebenezer, Mississippi, as reflected below:

City	Channel No. Present	Proposed
Ebenezer, Mississippi		280A

6. The Commission's Authority to institute rule proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **September 22, 1989,** and reply comments on or before **October 10, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Frank R. Jazzo
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.,
Suite 400
Washington, D.C. 20036

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments: Section 73.202(b) of the Commission's Rules *See Certification that Sections 603 & 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We do note that Ebenezer, Mississippi is listed in the Rand McNally Commercial Atlas as having a population of 150. The Atlas also indicates Ebenezer has a Post Office and a zip code.

[2] The coordinates for Channel 280A at Ebenezer are 32-54-13 and 90-10-18.

[3] There are currently five applications on file for the Channel at Union, Mississippi. The site restriction on 280A at Ebenezer protects the allotment at Union and the five applicants' sites.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-217

In the Matter of

Amendment of Section 73.202(b),	RM-6169
Table of Allotments,	RM-6465
FM Broadcast Stations.	
(Jensen Beach, Melbourne, Port St. Lucie and Vero Beach, Florida)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 11, 1989; Released: August 1, 1989

By the Chief, Allocations Branch:

1. At the request of St. Lucie Radio Corporation (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 3014 (1988), proposing the allotment of FM Channel 267A to Port St. Lucie, Florida, as that community's first local FM service. Petitioner filed supporting comments restating its intention to apply for the channel, if allotted. In response to the *Notice*, Treasure Coast Media, Inc. ("WCXL"), licensee of Station WCXL(FM), Channel 269A, filed a counterproposal seeking to upgrade from Channel 269A to Channel 272C2 at Vero Beach, Florida, and to modify its license to specify the higher class channel. In order to accomplish the upgrade, WCXL requests the substitution of Channel 236A for Channel 272A, licensed to Station WMMY(FM) ("WMMY") at Melbourne, Florida, the substitution of Channel 267A for Channel 272A licensed to Station WHLG(FM) at Jensen Beach, Florida, and the allotment of Channel 288A at Port St. Lucie.[2] WCXL filed a supplement to its counterproposal. Treasure Coast Radio, Inc., licensee of WAVW(FM) ("WAVW"), Channel 288A, Vero Beach, Florida, WHLG, Inc. ("WHLG"), licensee of Station WHLG(FM), Channel 272A at Jensen Beach and Dennis Johnson ("Johnson"), petitioner for Channel 288A at Jupiter, Florida (RM-6260), filed reply comments.[3]

2. As indicated in the *Notice*, Channel 267A can be allotted to Port St. Lucie in compliance with the minimum distance separation requirements of Section 73.207(b) of the Rules, provided the transmitter site is restricted to 9.3 kilometers (5.8 miles) southeast of the city in order to avoid short-spacing to Station WSTF(FM), Cocoa Beach, Florida, Channel 266C.[4]

3. We believe the public interest would be served by allotting Channel 267A to Port St. Lucie, since it could provide a first local FM service to the community. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 15, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Port St. Lucie, Florida	267A

4. The window period for filing applications will open on **September 18, 1989** and close on **October 18, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Jensen Beach, Melbourne, and Vero Beach have been added to the caption.

[2] Public Notice of the counterproposal was given August 11, 1988, Report No. 1743, RM-6465.

[3] WCXL, subsequently withdrew it counterproposal. Based on the withdrawal of WXCL's counterproposal it will be dismissed, and all comments relating to the proposal will not be considered herein.

[4] The coordinates for Port St. Lucie, Channel 267A, are North Latitude 27-13-11 and West Longitude 80-18-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-384

In the Matter of

Amendment of Section 73.202(b), RM-6102
Table of Allotments,
FM Broadcast Stations.
(Fort Myers Beach, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 11, 1989; Released: August 1, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 5005 (1988), issued in response to a petition for rule making filed by Justice Broadcasting-Fort Myers Beach, Inc. (Justice), licensee of Station WQEZ(FM), Channel 257A, Fort Myers Beach. The petition requests substitution of Channel 257C2 for Channel 257A at Fort Myers, Beach, and modification of Justice's license to specify operation on the higher class channel. Justice filed supporting comments restating its intention to apply for the channel, if allotted. Infinity Broadcasting Corporation of Florida (Infinity), licensee of Station WQYK(FM), Channel 258C1, St. Petersburg, Florida, filed comments. Justice filed reply comments.

2. In its comments Infinity notes that the reference coordinates Justice has proposed satisfy the 158 kilometer spacing requirement between WQYK(FM) and WQEZ(FM), which are first adjacent stations, and that it does not object to Justice's proposal to operate on Channel 257C2, so long as there is an available site within the area where the spacing requirements are met. Infinity remains skeptical that Justice will be able to locate such a transmitter site. Therefore, Infinity requests that the Commission expressly condition the allotment of Channel 257C2 to Fort Myers Beach on the use of a site that will provide full protection to WQYK(FM).[1] Infinity states that such a condition would be fully consistent with Commission precedent, citing *Atlantic City, New Jersey*, 57 RR 2d 1436 (1985). Infinity also request that the Commission require Justice to serve on Infinity a copy of any modification application it files requesting authority to operate on Channel 257C2.[2]

3. In its reply comments Justice notes that Infinity does not object to its proposal, but expresses skepticism as to whether Justice will be able to locate a transmitter site which complies with the minimum spacing requirements to Station WQYK-FM at St. Petersburg, Florida. In this regard, Justice notes that it has fully responded to Infinity's concerns in pleadings filed prior to the *Notice* in this proceeding and that its response was sufficient. Justice also takes issue with Infinity's characterization of and reliance upon *Atlantic City, supra*. Justice states that Infinity cites *Atlantic City* as precedent for the proposition that the Commission should expressly condition the allotment of Channel 257C2 at Fort Myers Beach on the specification of a site that will provide full protection to Station WQYK(FM). Justice contends that the *Atlantic City* order does not stand for the proposition cited, however, the subject of the order was an FM channel deletion, instead of an FM channel allotment. Therefore, Justice contends that there is no basis in Commission precedent for imposition of the condition which Infinity requests.

4. Prior to the *Notice*, and in response to pleadings filed by Justice, we carefully reviewed the materials submitted by both Justice and Infinity, and analyzed the engineering constraints on the location of potential transmitter sites. In the *Notice*, we concluded based on the information before us, that a site or sites meeting the Commission's spacing requirements is available. However, we invited Infinity and Justice to submit further comments concerning transmitter site availability. Infinity submitted comments stating that the reference coordinates Justice has proposed satisfy the 158 kilometer spacing requirement, but requesting that the Commission condition the allotment of Channel 257C2 to Fort Myers Beach on the use of a site that will provide full protection to Station WQYK(FM). Infinity has failed to submit further any information to show that there is no available site. We continue to believe that there is an available site or sites complying with the Commission's Rules. Moreover, we believe it is implicit in any grant of an upgrade request that the petitioner will proceed in good faith, and will file an application that is either acceptable for consideration under the Commission's rules and policies or seeks in good faith a waiver of the Commission's rules. Therefore, we believe a condition is unnecessary.

5. We believe the public interest will be served by substituting Channel 257C2 for Channel 257A at Fort Myers Beach, Florida, since it could provide that community with a first wide coverage FM service. Channel 257C2 can be allotted to Fort Myers Beach in compliance with the minimum distance separation requirement with a site restriction of 13 kilometers (8.1 miles) west of the city.[3] The site restriction will provide protection to Channel 258C1, Station WQYK(FM), St. Petersburg, Florida and avoid short-spacing to a pending application for Station WEDR(FM), Channel 256C, Miami, Florida. As proposed, we shall modify the licensee of Station WQEZ(FM) to specify operation on Channel 257C2 in accordance with Section 1.420(g) of the Commission's Rules.

6. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 15, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Fort Myers Beach, Florida	257C2

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Justice Broadcasting-Fort Myers Beach, Inc., for Station WQEZ(FM), Fort Myers Beach,

Florida, IS MODIFIED, to specify operation on Channel 257C2 in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Channel 257C2 can be allotted to Fort Myers Beach with a site restriction of 13 kilometers west of the city to avoid a short-spacing to Station WQYK(FM), St. Petersburg, Florida.

[2] Commission policy does not require Justice to serve Infinity with a copy of its modification application. Infinity is free, however, to monitor the Commission's periodically released notices of applications filed and, if it so desires, obtain a copy of Justice's application through the Commission's public reference facilities.

[3] The coordinates at the restricted site for Channel 257C2 are 26-25-30 and 82-04-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-37

In the Matter of

Amendment of Section 73.202(b), RM-6590
Table of Allotments,
FM Broadcast Stations.
(Two Harbors, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 11, 1989; Released: August 1, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 1975 (1989), issued in response to a petition filed by Twin Ports Broadcasting, Inc. (petitioner), proposing the substitution of FM Channel 282C2 for Channel 282A at Two Harbors, Minnesota. Petitioner also requested modification of its construction permit (BPH 880406MC) for Channel 282A, to specify operation on Channel 282C2. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 282C2 for Channel 282A at Two Harbors, Minnesota, since it could provide the community with its first wide coverage area FM Station. The substitution can be made in compliance with minimum distance separation requirements of Section 73.207 of the Commission's Rules at the site specified by petitioner.[1] Since Two Harbors is located within 320 kilometers (200 miles) of the U.S.- Canadian border concurrence of the Canadian government has been obtained. In addition, we have authorized a modification of the petitioner's construction permit for Channel 282A, Two Harbors, Minnesota, to specify operation on Channel 282C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 15, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Two Harbors, Minnesota	282C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Channel 282A, Two Harbors, Minnesota, IS MODIFIED TO SPECIFY operation on Channel 282C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 282C2 at Two Harbors are 46-59-51 and 91-50-13.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-619

In the Matter of

Amendment of Section 73.202(b),	RM-6477
Table of Allotments,	RM-6728
FM Broadcast Stations.	
(Ridge, Maryland and	
White Stone, Virginia[1])	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 11, 1989; Released: August 1, 1989

By the Chief, Allocations Branch:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 4 FCC Rcd 1246 (1989), issued in response to a petition filed by Keith A. Mayo and Chih Ping Mayo (petitioner), requesting the allotment of FM Channel 261A to Ridge, Maryland. In response to the *Notice*, petitioners filed comments withdrawing their interest in the proposal for Ridge, Maryland. Radio El Barco Blanco (Blanco) filed a counterproposal.[2] No other comments were received.

2. In its counterproposal, Blanco proposes the allotment of Channel 261A to White Stone, Virginia, as that community's first FM broadcast service. In support of its proposal, Blanco states White Stone is located in Lancaster County, Virginia, which has experienced significant growth and such growth is expected to continue. According to Blanco, the 1980 Census lists White Stone with a population of 409. Blanco indicated its intention to file an application for Channel 261A at White Stone.

3. Absent an expression of interest in the use of a channel it is the Commission's general policy to refrain from making a new allotment to a community. Therefore, since the petitioner has withdrawn its interest in Channel 261A at Ridge, Maryland, and no other party has stated an interest in the Ridge allotment, we will dismiss that proposal.

4. In view of the aforementioned, we shall only entertain the proposal for White Stone, Virginia. Channel 261A can be allotted to White Stone in compliance with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules provided there is a site restriction 8.5 kilometers (5.3 miles) east of the community.[3] The site restriction will prevent a conflict with Station WYFJ, Channel 261A, Ashland, Virginia.

5. We believe the public interest can be served by the allotment of Channel 261A to White Stone, Virginia, as that community's first FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 15, 1989**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
White Stone, Virginia	261A

6. The window period for filing applications for Channel 261A at White Stone, Virginia, will open on **September 18, 1989**, and close on **October 18, 1989.**

7. IT IS FURTHER ORDERED, That the petition of Keith A. Mayo and Chih Ping Mayo (RM-6477), proposing the allotment of Channel 261A to Ridge, Maryland, IS HEREBY DISMISSED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] White Stone, Virginia has been added to the caption.

[2] Public Notice of the counterproposal was given on April 20, 1989, Report No. 1776 (RM-6728).

[3] The coordinates for Channel 261A at White Stone, Virginia, are 37-38-00 and 76-17-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-146

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Palmyra, Missouri and Pittsfield, Illinois)	RM-4958

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 30, 1989; Released: August 1, 1989

By the Chief, Policy and Rules Division:

1. Before the Commission is a contingent petition for reconsideration filed by Contemporary Broadcasting, Inc. ("Contemporary"). Contemporary seeks reconsideration of the Commission's *Report and Order* substituting Channel 250C2 for Channel 252A at Palmyra, Missouri.[1] It maintains that the Commission could not allot Channel 250C2 to Palmyra without first resolving Contemporary's June 11, 1986 Petition for Reconsideration concerning its own efforts to have that channel allotted to Columbia, Missouri.

2. We have today adopted a *Report and Order* in the Columbia and Fulton, Missouri, rule making proceeding which eliminates the need to reconsider the Commission's decision to allot Channel 250C2 to Palmyra. In the Columbia proceeding, the Commission granted Contemporary's request to substitute Channel 252C2 for Channel 252A, and modified the license of Station KFMZ accordingly.[2] That decision renders moot Contemporary's Channel 250C2 proposal and the issues raised in its contingent petition for reconsideration. Therefore, we will grant Contemporary's contingent request to dismiss its petition for reconsideration.[3]

3. Accordingly, IT IS ORDERED, That the Contingent Petition for Reconsideration filed by Contemporary on October 13, 1986, IS DISMISSED.

4. Authority for the action taken herein is contained in Section 1.4(i) and 3030 of the Communications Act of 1934, as amended, and in Section 1.115 of our Rules.

5. For further information on this proceeding contact Douglas Minster, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] *Report and Order in* MM Docket No. 86-146, 2 FCC Rcd 5236 (1987).

[2] *See Report and Order, Columbia and Fulton, Missouri,* MM Docket No. 87-493, _____ FCC Rcd _____, adopted June 30, 1989.

[3] Our action dismissing this petition removes the remaining impediment to the issuance of a construction permit to Palmyra Broadcasting Company, licensee of Station KIDS, Palmyra.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NORTHWESTERN BELL
TELEPHONE COMPANY

Petition for Declaratory Ruling

ORDER INSTITUTING FURTHER PROCEEDINGS ON REMAND

Adopted: July 24, 1989; Released: August 1, 1989

By the Chief, Common Carrier Bureau:

1. We are initiating this supplemental proceeding following a remand which the Commission requested from the Court of Appeals for the District of Columbia Circuit.[1] The Commission requested the remand[2] to resolve certain factual questions that had arisen in the briefs on appeal, and if necessary, to supplement the record and to revise the initial agency decision.[3]

I. BACKGROUND

2. The *Teleconnect Order* denied a petition for declaratory ruling of Northwestern Bell Telephone Co. (Northwestern Bell) that Teleconnect is required to pay access charges for interstate calls placed to Teleconnect's Talking Yellow Pages Service. The Commission ruled that Teleconnect was not disabled by virtue of being an interexchange carrier from qualifying for the enhanced service provider exemption in this case. The Commission found that the application of the exemption[4] did not violate the resale structure established in the *Computer II* decision,[5] did not result in federal preemption of intrastate service, and did apply to the enhanced service offerings of an interexchange carrier such as Teleconnect. The Commission specifically decided that talking Yellow Pages was an enhanced service entitled to the exemption. It stated that under the exemption, enhanced service providers were treated as "end users", so that if an end user taking service under the particular configuration which Teleconnect used would be exempted from access charges, so too would Teleconnect's enhanced service offering.[6] The Commission found that, contrary to the arguments raised by Northwestern Bell, the arrangement Teleconnect uses was technically not FX service because unlike an FX customer Teleconnect has a point of presence (POP) in the local exchange where calls originate.[7] Rather the Commission found that the Teleconnect configuration was more like a typical "leaky PBX" arrangement not subject to access charges.[8] Instead, like a similarly configured end user Teleconnect would pay subscriber line charges on its local exchange lines and special access surcharges on its private line connections.

3. On appeal, a factual question developed over the precise network configuration which Teleconnect uses. The FCC requested remand to resolve this question and the Court granted this request.[9] The instant order seeks additional information from Teleconnect on its configuration and service needs and requests comment thereon from interested parties.

II. FACTUAL ISSUES

4. Teleconnect is requested to respond to the following questions. Teleconnect should state exactly how Talking Yellow Pages calls are routed from end to end. It should describe the nature, location, and ownership of all facilities used, the nature of the connections between those facilities (*e.g.*, whether switched or hardwired), the nature of any underlying services used and the identity of the underlying service providers. Teleconnect should also describe the specific tariffed services it and any other underlying service providers purchase from Northwestern Bell which are used in the provision of Talking Yellow Pages. Teleconnect should state whether any other underlying service provider pays interstate switched access charges to Northwestern Bell in connection with provision of Talking Yellow Pages service. Teleconnect should also indicate whether, and to what extent, services other than the Talking Yellow Pages are provided over the same facilities. Teleconnect should explain the nature of any such services. Teleconnect should provide the foregoing information for the network configuration used at the time Northwestern Bell filed its petition for declaratory ruling, and state whether Teleconnect's arrangements have changed in any respect since that time. If those arrangements have changed, Teleconnect should state when such changes occurred and provide the requested information for those changed arrangements as well. Interested parties are invited to file comments regarding the implications of Teleconnect's response with respect to the application of the Commission's access charge rules. Comments shall be filed in accordance with the schedule established in paragraph 7.

III. EX PARTE PROVISIONS

5. For purposes of this non-restricted proceeding, members of the public are advised that *ex parte* presentations are permitted except during the "Sunshine Agenda" period. *See generally* Section 1.1206 (a) of the Commission's Rules. The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decison or Order in the matter; (2) issues a public notice stating that the matter has been deleted form the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* Section 1.1202(f) of the Commission's Rules. During the sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or Commission staff for the clarification or adduction of evidence for the resolution of issues in the proceeding. *See* Section 1.1203 of the Commission's Rules.

6. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding; or (2) if oral, is made without advance notice to the parties to the

proceeding and without opportunity for them to be present. *See* Section 1.1202(b) of the Commission's rules. Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of that presentation to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in the person's previously-filed written comments, memoranda, or filings in this proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See* Section 1.1206 of the Commission's Rules.

IV. ORDERING CLAUSES

7. Teleconnect IS hereby ORDERED to respond to the questions raised in para. 4, *supra* not later than **September 18, 1989.** Comments on Teleconnect's response ARE TO BE FILED no later than **November 2, 1989.** Replies ARE TO BE FILED no later than **December 4, 1989.** An original and five copies of all statements, responses, briefs comments or replies SHALL BE FILED with the Federal Communications Commission, Washington, D.C. 20554. An additional copy SHALL also BE FILED with Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W. Washington, D.C. 20554, and at the offices of International Transcription Services (ITS), 1919 M Street, N.W., Room 246, Washington, D.C. 20037. In reaching a decision, the Commission may consider information and ideas not contained in filings, provided that such information is reduced to writing and placed in the public file, and provided that the fact of our reliance on any such information or ideas is noted in the Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock, Chief
Common Carrier Bureau

FOOTNOTES

[1] Order, Northwestern Bell Tel. Co. v. FCC, D. C. Cir. No. 87-1745, filed March 1, 1989 (per curiam) (*Remand Order*), *granting* Emergency Motion for Remand of the Federal Communications Commission, dated Feb. 23, 1989 (Emergency Motion).

[2] Emergency Motion at 2.

[3] Northwestern Bell Tel. Co., 2 FCC Rcd 5986 (1987) (*Teleconnect Order*). Another case was consolidated for purposes of judicial review with Northwestern Bell v. FCC and therefore also was remanded to the agency. Mountain States Tel. Co. v. FCC, No. 88-1261 (D.C. Cir.)(pet. filed Apr. 1, 1988). In *Mountain States* v. *FCC*, the petitioner sought review of the Commission's decision in WATS Related and other Amendments of Part 69 of the Commission's Rules (CC Docket No. 86-1), 3 FCC Rcd 496 (1988)(*RCA Globcom Order*). Because the factual questions at issue involve only the *Teleconnect Order*, we do not seek further information or comment regarding the *RCA Globcom* decision.

[4] 47 C.F.R. § 69.5.

[5] Amendment of Section 64. 702 of the Commission's Rules and Regulations (Second Computer Inquiry), 84 FCC 2d 50, 75 n.19 (1980).

[6] 2 FCC Rcd 5987-88.

[7] 2 FCC Rcd at 5988 n. 9. The Commission stated that if Teleconnect used FX service, interstate access charges would apply because end users who subscribe to FX service are assessed access charges. *Id.* at n. 29.

[8] 2 FCC Rcd at 5988.

[9] Emergency Motion; *Remand Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONFERENCE-CALL USA, INC.,
Complainant,

v. File No. E-89-134

GTE CORPORATION AND
THE GTE TELEPHONE COMPANIES,
Defendants.

ORDER

Adopted: July 21, 1989; Released: August 1, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On March 6, 1989, Conference-Call USA, Inc. (CC/USA) filed a formal complaint with the Commission against GTE Corporation and the GTE Telephone Companies (together GTE). CC/USA alleged that GTE, by refusing to provide CC/USA access to GTE's local exchange facilities, violated Sections 201 and 202 of the Communications Act, 47 U.S.C. §§ 201, 202.

2. After preliminary discussions, the Enforcement Division granted the parties time in which to negotiate a resolution of the matters in controversy. Subsequently, on June 26, 1989, CC/USA moved for dismissal without prejudice of the above-captioned complaint, stating that the parties had reached a mutually acceptable basis for settlement of the dispute. Because there is no longer a controversy between the parties, we find that it is in the public interest to grant the motion.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated in 47 C.F.R. § 0.291, that the Motion to Dismiss, filed by Conference-Call USA, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Acting Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 1, 1989

COMMON CARRIER BUREAU CLARIFIES SERVICE REQUIREMENTS FOR *EX PARTE* CONTACTS CONCERNING SHARED NETWORK FACILITIES AGREEMENTS (SNFAs)

On July 14, 1989, the Common Carrier Bureau issued a Public Notice announcing, *inter alia*, that that portion of Phase I of the pending tariff investigation that is before the Commission pursuant to the opinion of the Court in *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C.Cir. 1988) (*i.e.*, Shared Network Facilities Agreements issues) is a restricted proceeding for purposes of Section 1.1200, *et seq.*, of the Commission's Rules, 47 C.F.R. § 1.1200, *et seq*. The Public Notice further stated that any written presentations in the aforementioned portion of the CC Docket No. 85-166, Phase I, tariff investigation, the formal complaints listed in Appendix A to the Public Notice, or the informal complaints listed in Appendix B to the Public Notice must be served on all parties of record in CC Docket No. 85-166, all parties to any formal complaints and informal complaints listed in Appendix C, and all parties to any substantively related complaints that may in the future be filed. No oral presentations shall be made without notice to all such parties and an opportunity for them to be present.

Parties making *ex parte* presentations in any of the aforementioned proceedings must, as noted, serve all parties listed in the appendices to the July 14 Public Notice. However, only those parties that have participated in that portion of Phase I of the pending tariff investigation that is before the Commission pursuant to the opinion of the Court mentioned in the preceding paragraph must be served. Parties that have only participated in other portions of the CC Docket No. 85-166 investigation and are not parties to any of the formal or informal complaints listed in appendices A and B to the July 14 Public Notice need not be served.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, FM
Broadcast Stations,
(Columbia, Missouri)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 30, 1989; Released: August 1, 1989

By the Chief, Policy and Rules Division:

1. Before the Commission is a petition for reconsideration filed by Contemporary Broadcasting, Inc. ("Contemporary"). Contemporary seeks reconsideration of the Commission's action returning as unacceptable its August 27, 1985, petition for rule making proposing substitution of Channel 250C2 for Channel 252A at Columbia, Missouri.

2. By letter dated May 12, 1986, the Commission returned Contemporary's rule making petition based on the conclusion that the proposed substitution at Columbia would be impermissibly short spaced to a facility at St. Louis, Missouri. In its petition for reconsideration, Contemporary argues that the Commission's decision to return the rule making petition was in error. Contemporary maintains that it is not required to protect the current buffer zone of the St. Louis facility because that station is short spaced to other stations and will need to relocate to comply with the Commission's minimum mileage separation requirements. In Contemporary's opinion, the relocation of the St. Louis facility can resolve the short spacing to its proposed channel. Thus, the Commission's action dismissing the rule making petition was premature and warrants reconsideration.

3. We have today adopted a *Report and Order* in the Columbia and Fulton, Missouri, rule making proceeding which eliminates the need to reconsider the Commission's decision to return Contemporary's rule making petition. In the Columbia proceeding, the Commission granted Contemporary's request to substitute Channel 252C2 for Channel 252A, and modified the license of Station KFMZ accordingly.[1] That decision renders moot Contemporary's Channel 250C2 proposal and the issues raised in its petition for reconsideration. Therefore, we will grant Contemporary's request, in the Columbia proceeding, to dismiss its petition for reconsideration.

4. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Contemporary on June 11, 1986, IS DISMISSED.

5. Authority for the action taken herein is contained in Section 1.4(i) and 303 of the Communications Act of 1934, as amended, and in Section 1.115 of our Rules.

6. For further information on this proceeding contact Douglas Minster, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] *See Report and Order, Columbia and Fulton, Missouri*, MM Docket No. 87-493, _____ FCC Rcd _____, adopted June 30, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-215

In the Matter of

Amendment of Section 73.202(b),	RM-5742
Table of Allotments,	RM-5791
FM Broadcast Stations	RM-6017
(Campbellsville, Smiths Grove,	RM-6176
Cave City, Horse Cave, and	RM-6294
Liberty, Kentucky, Donelson	RM-6557
and Mt. Juliet, Tennessee)	RM-6558

ORDERS TO SHOW CAUSE

Adopted: July 13, 1989; Released: August 2, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 3078 (1988), issued in response to a petition filed by Michael Harding ("Harding"), proposing the allotment of Channel 260A to Campbellsville, Kentucky, as a second local service (RM-6176). In response to the *Notice*, Hilltopper Broadcasting, Inc. ("Hilltopper"), licensee of WBLG(FM), Channel 296A, Smiths Grove, Kentucky, filed a counterproposal seeking the upgrade of Station WBLG(FM) at Smiths Grove, Kentucky (RM-6557). Hilltopper's counterproposal seeks the substitution of Channel 296C2 for Channel 296A at Smiths Grove, Kentucky and modification of the license of Station WBLG(FM) to specify operation on the higher powered channel. In order to accommodate the channel substitution at Smiths Grove, Hilltopper proposes the substitution of Channel 260A for Channel 294A at Cave City, Kentucky, and modification of the construction permit (BPH-861126MQ), and the allotment of Channel 232A or Channel 254A to Campbellsville to satisfy the interest expressed by Harding.[1]

2. By a separate *First Report and Order*, the Commission has allotted Channel 260A to Campbellsville, Kentucky, as the community's second local FM service, Channel 264A to Horse Cave, Kentucky, as the community's first local FM service, Channel 294A to Mt. Juliet, Tennessee, as the community's first local FM service, and substituted Channel 254A for Channel 288A at Liberty, Kentucky, as a first local FM service.

3. In order to accomplish the allotment of Channel 296C2 at Smiths Grove, Kentucky, it is necessary to substitute Channel 279A for Channel 294A at Cave City, Kentucky, and Channel 281A for Channel 280A at Campbellsville, Kentucky. Therefore, we are herein issuing *Show Cause Orders* to Steven W. Newberry, permittee for Station WHHT(FM), Channel 294A, Cave City and Heartland Communications, Inc., licensee of Station WCKQ(FM), Channel 280A, Campbellsville, seeking comments as to why their licenses or construction permit should not be modified to specify operation on Channel 279A and 281A in lieu of Channel 294A and 280A, respectively. A staff engineering analysis confirms that Channel 296C2 can be substituted for Channel 296A at Smiths Grove, Kentucky.[2] Channel 279A can be substituted for Channel 294A at Cave City, Kentucky, at the construction permit site.[3] Channel 281A can be substituted for Channel 280A at Campbellsville, Kentucky, at Station WCKQ's transmitter site.[4]

4. Hilltopper states its willingness to reimburse both stations WHHT(FM), Channel 294A, Cave City, and WCKQ(FM), Channel 280A, Campbellsville, for the reasonable expenses incurred in modifying their facilities to operate on the new channels proposed herein.

5. We believe the public interest would be served by the proposed channel substitution at Smiths Grove, since it could provide the community with an expanded FM service. As requested, we shall propose to modify the license of Station WBLG(FM), to specify operation on Channel 296C2. In accordance with Section 1.420(g) of the Commission's Rules we shall not accept other expressions of interest in the proposed channel. In addition, because an opportunity has already been provided for the filing of counterproposals, we will not accept any additional counterproposals.

6. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Campbellsville, Kentucky	280A	281A
Cave City, Kentucky	294A	279A
Smiths Grove, Kentucky	296A	296C2

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Steven M. Newberry, permittee of Station WHHT(FM), Channel 294A, Cave City, Kentucky, SHALL SHOW CAUSE why its construction permit should not be modified to specify operation on Channel 279A in lieu of Channel 294A.

8. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Heartland Communications, Inc., licensee of Station WCKQ(FM), Channel 280A, Campbellsville, Kentucky, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 281A in lieu of Channel 280A.

9. Pursuant to Section 1.87 of the Commission's Rules, Steven M. Newberry and Heartland Communications, Inc. may, not later than **September 25, 1989,** file a written statement showing with particularity why its license or construction permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Steven M. Newberry and Heartland Communications, Inc., to furnish additional information. If permittee or licensee, raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission

may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Steven M. Newberry and Heartland Communications, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

John Wells King, Esq.
Haley, Bader & Potts
2000 M Street, N.W.,
Suite 600
Washington, D.C. 20036
(Counsel for Heartland
Communications, Inc.)

Steven M. Newberry
Route One
Cave City, Kentucky 42127
(Permittee for Station WHHT)

11. Interested parties may file comments on or before **September 25, 1989,** and reply comments on or before **October 10, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the parties to this proceeding, as follows:

John F. Garziglia,
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(Counsel for Hilltopper Broadcasting, Inc.).

Steven C. Schaffer, Esq.
Schwartz, Woods & Miller
Suite 300, Dupont Circle Building
1350 Connecticut Avenue, N.W.
Washington, D.C. 20036-1702
(Attorney for Michael Harding)

Blair, Joyce & Silva
1825 K Street, N.W., Suite 510
Washington, D.C. 20006
(Counsel for Steven Newberry)

Christopher J. Reynolds, Esq.
Dempsey & Koplovitch
1401 New York Avenue, N.W.
Suite 630
Washington, D.C. 20005
(Counsel to First Media of Monterey)

Timothy K. Brady, Esq.
7113 Peach Ct. - Suite 208
P.O. Box 986
Brentwood, Tennessee 37024-0986
(Counsel to Grady Lynn and Lee Stinson, Jr.)

R. Dale Bay
L & C Tower
23rd Floor
Nashville, Tennessee 37219

Carlos Wesley
WKDO Radio Station
P.O. Box B
Liberty, Kentucky 42539

John Wells King, Esq.
Haley, Bader & Potts
2000 M Street, N.W., Suite 600
Washington, D.C. 20036
(Counsel for Heartland Communications, Inc.)

Steven M. Newberry
Route One
Cave City, Kentucky 42127
(Permittee for Station WHHT)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.*

13. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Hilltopper's proposal and an earlier proposal filed by its predecessor in interest, Faye S. Anderson, were consolidated in this proceeding. The earlier proposal had suggested the upgrade at Smiths Grove on Channel 294C2 or Channel 296C2, the substitution of Channel 279A for Channel 294A at Cave City, and the substitution of Channel 281A for Channel 280A, licensed to WCKQ(FM) at Campbellsville, Kentucky.

[2] The coordinates for Channel 296C2, Smiths Grove, are 36-50-10 and 86-16-40.

[3] The coordinates for Channel 279A, Cave City, are 37-06-39 and 85-58-41.

[4] The restricted site coordinates for Channel 281A, Campbellsville, are 37-20-05 and 85-22-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

OLIVER PRODUCTIONS, INC.

For Declaratory Ruling

MEMORANDUM OPINION AND ORDER

Adopted: July 14, 1989; Released: August 2, 1989

By the Commission:

1. The Commission has before it an Application for Review filed by Telecommunications Research and Action Center (TRAC) on December 6, 1988. TRAC seeks review of the Mass Media Bureau's ruling of November 3, 1988, *Oliver Productions, Inc.*, 3 FCC Rcd 6642, in which it determined, based on the information submitted, that segments of "The McLaughlin Group" are "bona fide newscasts" and, as such, are exempt from the "equal opportunities" provision of Section 315(a) of the Communications Act, 47 U.S.C. Section 315(a).[1]

BACKGROUND

2. On October 24, 1988, Oliver requested the Commission to declare that appearances by legally qualified candidates during the "news reporting segments" of "The McLaughlin Group" are exempt from equal opportunity requirements as "bona fide newscasts" under Section 315(a)(1) of the Communications Act. The request characterized "The McLaughlin Group" as a weekly series, consisting of four to six "news reporting segments" and "panel discussions," per program. It specifically sought an exemption only for the "news reporting segments" of the program. According to Oliver, the host, John McLaughlin, briefly introduces a news reporting segment that uses video taped news clips which are obtained from PBS, CNN and the commercial broadcasting networks. It contends that many of these news clips previously aired on the newscasts of the originating network. Following each "news reporting segment," McLaughlin initiates a panel discussion of the particular topic introduced. The program continues with another "news reporting segment" and another panel discussion and so on in a topic-by-topic format covering major national and world events. Oliver states that it selects the topics for each week's program solely on the basis of their genuine news value and not with the intent to advance the candidacy of any particular individual.

3. The Bureau granted Oliver's request because it determined that the "news reporting segments" of "The McLaughlin Group" satisfy all the criteria for "bona fide newscast" exemptions as contemplated in Section 315. TRAC,[2] in its Application for Review, essentially argues that the Bureau misinterpreted and misapplied Section 315. TRAC first argues that the declaratory ruling is unnecessary because the segments at issue involve only brief "fleeting" appearances by candidates, to which the equal opportunities provision of Section 315 does not apply. Second, according to TRAC, the application of Section 315(a)(1) exemption to "The McLaughlin Group" is in conflict with the plain language of the statute in that it bears no resemblance to a traditional newscast. Third, TRAC contends that Congress intended only to exempt newscasts which are produced and controlled by Commission licensees and since Oliver is not a licensee or a network, it does not meet this requirement for a newscast exemption. Finally, TRAC argues that Congress specifically refused to exempt "panel discussions" such as "The McLaughlin Group."

DISCUSSION

4. Section 315 of the Act provides that if a broadcaster permits a legally qualified candidate for public office to "use" a station's facilities, it must afford equal opportunities to all other candidates for that office. In 1959, Congress amended this section in an effort to encourage increased news coverage of political campaign activity. It exempted from the equal opportunities requirement an appearance by a legally qualified candidate on four categories of news programming:

> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a). To determine the meaning and scope of the subsection (a)(1) "bona fide newscast" exemption, we refer to the language of the statute and the legislative history. All of the exemptions apply to news broadcasts and all contain the "bona fide" requirement. We have held that the term "bona fide" was intended to emphasize Congress' intent that the programs be of genuine news value and not be designed to serve the political advantage of any particular candidacy. *Henry Geller*, 95 FCC 2d 1236, 1243 (1983), citing Conference Rep. No. 1069, 86th Cong., 1st Sess. at 4 (1959); 105 Cong. Rec. 14442 (Pastore); *id.* at 16224 (Brown); *id.* at 17828 (Pastore); *id.* at 17831 (Scott).

5. The legislative history provides program characteristics for some of the specific exemptions, such as the "regularly scheduled" requirement for the "bona fide news interview" exemption. Congress did not, however, prescribe the characteristics that would qualify programming for the "bona fide newscast" exemption. The Bureau has stated, and we agree, that a determination of whether the format of certain programming can be treated as a bona fide newscast should be judged on a basis of whether the program reports news of some area of current events, in a manner similar to more traditional newscasts. *Paramount Pictures Corp.*, 3 FCC Rcd 245, 246 (M.M. Bur. 1988) ("Entertainment Tonight" and "Entertainment This Week"). Although the legislative history is vague as to the

meaning of "newscast," it does emphasize a congressional intent to increase news coverage of political campaigns, to give broadcasters great deference in making reasonable news programming judgments, and to give the Commission flexibility and discretion in interpreting the exemptions and in applying them to particular program formats in order to further the basic purpose of increased political information to the public. As the court stated in affirming the Commission decision to exempt debates and press conferences:

> In creating a broad exemption to the equal time requirements in order to facilitate broadcast coverage of political news, Congress knowingly faced risks of political favoritism by broadcasters, and opted in favor of broader coverage and increased broadcaster discretion. Rather than enumerate specific exempt and non-exempt 'uses,' Congress opted in favor of legislative generality preferring to assign that task to the Commission.

Chisholm v. FCC, 538 F.2d 349, 366 (1976).

"Fleeting Use" Exception

6. TRAC describes the candidate appearances on the segments at issue as "fleeting appearances." It argues that these types of appearances are not within the intended scope of Section 315 and, thus, it was unnecessary for the staff to issue the ruling. TRAC does not take issue with the length of the segments: "it is apparent that the segments now at issue consist of brief presentations, generally 30 seconds or less, of news footage. . . ." Application for Review, p. 2. Nor is there a question that the camera distance may involve individual shots of candidates, as opposed to groups. The issue raised by TRAC is simply whether or not appearances by candidates on "The McLaughlin Group" fall within the "fleeting use" exception.

7. The Commission has recognized a "fleeting use" exception to which Section 315(a) does not apply. *See Letter to Allen H. Bondy*, 14 RR 1199 (1957); *Interpretive Opinion on Section 315 of the Act*, 26 FCC 715, 749 (citing *Bondy); National Urban Coalition*, 23 FCC 2d 123 (B/c Bur. 1970); *Time, Inc.*, 55 RR 2d 581 (M.M. Bur. 1984). In these cases, the candidate's appearance was not considered a "use" of a broadcasting station within the meaning of Section 315(a) because the appearance was *de minimis* in length or format. In *Bondy, supra*, the candidate appeared briefly with a large assembly of people at a ceremony. In *National Urban Coalition, supra*, the candidate appeared for approximately four seconds in a group shot of about 100 people, and for nearly three seconds in a medium shot of six people in which his face only partially appeared. The Bureau reasoned that the duration was too fleeting or the camera range too distant for the candidate to be "readily identifiable." *Id.* at 123-24. The "fleeting use" exception was extended in *Time, Inc., supra*, to include individual shots of candidates for two to three seconds during commercials for Time magazine because "the format and specific 'two-three second' limitation constitutes a similarly *de minimis* candidate appearance." *Id.* at 582.

8. With respect to the duration of the appearances at issue on "The McLaughlin Group," there is no dispute that they generally range from a fraction of a second to about 30 seconds. Although the Commission has not established a specific time limit at which the "fleeting use" exception no longer applies, we certainly have not extended it beyond a few seconds. *Time, Inc., supra; National Urban Coalition, supra*. Although we have not stated the outer limits for an appearance's duration to be considered "fleeting," we cannot agree with TRAC that all of the appearances at issue here, some of which last for 30 seconds, fall within the "fleeting use" exception. Therefore, even though many of the appearances by candidates on "The McLaughlin Group" may indeed be "fleeting uses," the ruling also covers those appearances that would not be considered "fleeting" and was thus not "unnecessary."

Segmentation of Programming

9. We believe the Bureau was correct in its finding that the "news reporting segments" of "The McLaughlin Group" satisfy the criteria necessary for the newscast exemption under Section 315(a)(1). Regarding the "bona fide" requirement, there is no information before the Commission to indicate that the "news reporting segments" are selected for reasons other than their genuine news value or are designed to advance or harm any particular candidacy. Further, in terms of format, the segments in question are presented to inform the public of major national and world events and the news reports are presented in a conventional newscast manner. The Bureau also noted that the Commission and the Bureau have, on several occasions, granted news interview exemptions to segments of programs which contain bona fide news interviews. *See Multimedia Entertainment, Inc.*, 56 RR 2d 143, 148 (1984) ("Donahue"); *CBS, Inc.*, 2 FCC Rcd 4377 (M.M. Bur. 1987) ("The Morning Program"); *CBS, Inc.*, 55 RR 2d 864 (M.M. Bur. 1984) ("The American Parade"). While the Commission has not, to date, exempted newscast segments of otherwise nonexempt programs, the Commission has recognized in applying Section 315 that programs may include various segments, including exempt news segments. *See ABC, Inc.*, 46 RR 2d 1205 (1980) ("Good Morning America"); *Lar Daly*, 40 FCC 314 (1960) ("Today"). Thus, the Bureau correctly stated that as long as the brief reports of current news stories on "The McLaughlin Group" are distinct segments and the purpose is not to advance or harm any candidacies, those segments should be accorded the bona fide newscast exemption. We also agree with the Bureau that its ruling was consistent with the statutory objective of increasing the news coverage of political campaign activity.

Traditional " Newscast "

10. As previously explained, in determining whether programming falls within the "bona fide newscast" exemption, the Bureau has stated, and we agree, that we will first consider whether the broadcast reports about some area of current events, in a manner similar to more traditional newscasts. *Paramount Pictures Corp., supra*, at 246. [3] TRAC alleges that in order to constitute a "newscast," the journalist or news reader must present a series of news items for the purpose of bringing the audience up to date, as opposed to one subject presented by McLaughlin in each newscast segment for the purpose of introducing a discussion. According to TRAC, it is not

possible to view "The McLaughlin Group" as a routine news broadcast presented in a traditional anchor-news reader format. We disagree.

11. Oliver sought a Section 315(a)(1) exemption for the "news reporting segments" only. During those segments, McLaughlin reports on current national and world news using the methods typical of traditional newscasts. The video taped features accompanying these reports, which may contain appearances by candidates, are supplied by PBS, CNN and the commercial broadcasting networks. The news videotapes often have aired on the newscasts of the originating networks. As discussed in paragraph 9, *supra*, the Commission has recognized that segments of certain programs may be granted news exemptions while other segments of the same program may not be exempt. As also discussed in paragraph 9, we believe the news segments on "The McLaughlin Group" meet the exemption standard. Oliver asserts that they are presented in order to bring the audience up to date, a factor which TRAC views as essential to qualifying for the news exemption. The fact that the news segments are separated by panel discussions does not, we believe, make them non-exempt.

Program Controlled by a Licensee or Network

12. TRAC asserts that "[a]t every stage of the legislative history, the relevant committees and debating members reiterated with great frequency that a central element to programs being exempt from Section 315 as newscasts is that such programs must be 'under the control of the broadcast station or the network. . . .'" To support this statement, TRAC cites the separate House and Senate Reports and floor debates on the amendment. However, the differences between the House and Senate versions of the 1959 amendment were resolved in conference, resulting in the current language of Section 315(a). *See* Conference Rep. No. 1069, 86th Cong., 1st Sess. (1959). The House and Senate Reports pre-dated the Conference Report and are therefore, not controlling. The Conference Report, adopted by the House on September 2, 1959, and the Senate the following day, references program control by a licensee or network only in connection with the "bona fide news interview" exemption. *Id.* at 4. *See* 105 Cong. Rec. 17776-82, 17827-32 (1959).

13. Relying on *Citizens for Reagan*, 58 FCC 2d 925 (1976), TRAC also contends that in order "[t]o be considered *bona fide* within the meaning of Section 315, a program must be produced and controlled by a licensee or a network." Since the question of licensee or network control is a requisite characteristic in only one of the news exemptions under Section 315, news interview, TRAC incorrectly states that the question of licensee control was determinative in *Citizens for Reagan*. In that case, the Commission considered the applicability of the Section 315(a)(1) *newscast* exemption to the appearance of a presidential candidate in a 30-minute interview, which the station conducted, filmed and edited into five segments for inclusion in its regular weekday evening newscasts. Although the Commission acknowledged that a separate airing of the interview would not have qualified for the Section 315(a)(2) news interview exemption (because it was not regularly scheduled), inclusion of the edited segments in the station's news programs would qualify them under the Section 315(a)(1) newscast exemption, unless it were shown that the broadcaster's decision to include the interview segments in the newscasts was clearly unreasonable or in bad faith and was not for their newsworthiness. *Id.* at 927. The Commission distinguished *Citizens for Reagan* from *Hon. Clark W. Thompson*, 40 FCC 328 (1962), in which the Commission declined to grant a newscast exemption to a program, that was prepared by the candidate himself and aired in its entirety, simply because it aired as part of a broadcaster's newscast. The interview segments at issue in *Citizens for Reagan* were exempt not because the licensee controlled them, but because they were similar to other news segments. They were the product of the station's news gathering functions, such as, interviewing, filming, and editing. As the Bureau previously stated in *Paramount Pictures Corp.*, *supra*, 3 FCC Rcd 245 (1988), the programs which should be accorded the bona fide newscast exemption include those which report about some area of current events, and utilize methods of news gathering and reporting similar to more traditional newscasts.

Congress' Intent Regarding Panel Programs

14. The panel discussion segments of "The McLaughlin Group" are not at issue here because Oliver did not request a news exemption for those segments. We find no suggestion in the legislative history cited by TRAC that in stating that panel discussions were not one of the four exemptions, Congress also intended to render non-exempt news segments of hybrid programs that also include panel discussion segments. Therefore, we reject TRAC's argument that the legislative history regarding panel discussions forecloses the grant of an exemption for the news segments of "The McLaughlin Group."

CONCLUSION

15. After a careful review of TRAC's Application, we believe that the Bureau's Ruling was correct. We believe that the Application for Review does not contain sufficient grounds to warrant reversal or modification.

16. Therefore, pursuant to Section 1.115(g) of the Commission's rules, the Application for Review is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On December 20, 1988, Oliver Productions, Inc. (Oliver), the independent television production company which produces "The McLaughlin Group" and the party who sought the declaratory ruling, filed an Opposition to the Application for Review. National Broadcasting Company, Inc., filed comments in support of the Ruling on the same day. In response to Oliver's Opposition, TRAC filed a Reply on December 28, 1988.

[2] TRAC describes itself as "a national organization which has frequently appeared before the Commission on behalf of its listener and viewer members in connection with Section 315 and other matters relating to their right to receive information."

[3] As the Bureau noted, it has only ruled twice that specific programming warranted the newscast exemption. *Paramount Pictures Corp., supra,* ("Entertainment Tonight" and "Entertainment This Week"); *Rev. Donald L. Lanier,* 37 FCC 2d 952 (B/c Bur. 1972) ("The Church Today").

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-325

In the Matter of

Amendment of Section 73.202(b), RM-6719
Table of Allotments,
FM Broadcast Stations.
(Caro, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 13, 1989; Released: August 2, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Prime Time Radio, Inc. (petitioner), requesting the substitution of FM Channel 221A for 285A at Caro, Michigan, and modification of its license for Station WIDL to specify operation on the new channel.

2. In support of the proposal, petitioner states that Station WIDL currently operates on Channel 285A from a site that is short spaced by two kilometers to Station WFYC-FM, Alma, Michigan. The substitution at Caro will eliminate the existing grandfathered short spacing at Alma. Petitioner further states that the allotment of Channel 221A at Caro is now possible because of recent Commission action substituting Channel 271C2 for Channel 221A at Bad Axe, Michigan.[1] A construction permit for Channel 271C2 at Bad Axe was granted on September 29, 1988 (BPH-880609IB).

3. We believe petitioner's proposal warrants consideration. Channel 221A can be allotted to Caro, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules at the petitioner's specified site.[2] Canadian concurrence is required since Caro is located within 320 kilometers (200 miles) of the U.S.-Canadian border. We shall propose to modify the license of Station WIDL to specify operation on Channel 221A in lieu of Channel 285A without inviting other expressions of interest. *See* 47 CFR Section 1.420(g).

4. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Caro, Michigan	285A	221A

5. IT IS ORDERED, That the Secretary of the Commission Shall Send by Certified Mail, Return Receipt Requested, a copy of this Notice to the following:

Thumb Broadcasting, Inc.
935 S.Van Dyke Road
Bad Axe, Michigan 48413
(Licensee of Station WLEW(FM),
Channel 221A)

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **September 25, 1989,** and reply comments on or before **October 10, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert Benkleman, President
Prime Time Radio, Inc.
1184 Cleaver Road
Caro, Michigan 48723

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] *See* MM Docket 87-187, 3 FCC Rcd 2184 (1988).

[2] The coordinates for channel 221A at Caro are 43-28-51 and 83-20-31.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-125,
Phase II

In the Matter of

Annual 1985 Access Tariff Filings

Extension of Time

ORDER

Adopted: July 24, 1989; Released: July 24, 1989

By the Chief, Common Carrier Bureau:

1. The Commission released an Order in the above-captioned proceeding on March 9, 1987, requiring local exchange carriers (LECs) to refund unlawful Minimum Monthly Usage Charges (MMUCs) and presubscription change charges. The original date set for refunds was July 7, 1987.[1] The refund deadline has since been extended several times.

2. On April 27, 1989, the Commission released an Order denying petitions for reconsideration of the *1985 Terms and Conditions Order* filed by MCI Telecommunications Corporation, GTE Service Corporation, and New York Telephone Company.[2] On June 13, 1989, the BellSouth Corporation filed a petition for review of the *April 27 Order* with the Court of Appeals for the District of Columbia Circuit. The petition is pending.

3. On June 15, 1989, the BellSouth Corporation (BellSouth) filed with the Commission a request for stay until the Court of Appeals acts on its pending petition for review of the *April 27 Order*. The Bureau on June 26, 1989, released an Order[3] granting BellSouth's request, extending the refund deadline until July 31, 1989.

4. The Bureau finds that additional time is necessary for consideration of arguments raised in BellSouth's request for stay. Therefore, we hereby grant all LECs a further extension of time until September 30, 1989, to refund MMUCs and presubscription change charges found unlawful in the *1985 Terms and Conditions Order*. Carriers are advised that the Commission retains its discretion to require payment of interest on any refund amounts.

5. Accordingly, IT IS ORDERED that all local exchange carriers ARE GRANTED an extension of time until September 30, 1989, to make refunds of Minimum Monthly Usage Charges and presubscription change charges as required by the *1985 Terms and Conditions Order*.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 2 FCC Rcd 1416 (1987) (*1985 Terms and Conditions Order*).

[2] Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 3959 (1989) (*April 27 Order*).

[3] Annual 1985 Access Tariff Filings, Order, DA 89-716, released June 26, 1989 (Com.Car.Bur.).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-475

In the Matter of

Amendment of Part 22 of the
Commission's Rules to Allow
Public Mobile Service Applicants
to Commence Construction After
Filing FCC Form 401, but Prior
to Receiving an Authorization

REPORT AND ORDER

Adopted: May 17, 1989; Released: August 2, 1989

By the Commission: Commissioner Dennis issuing a separate statement.

I. BACKGROUND

1. On October 27, 1988, we issued a Notice of Proposed Rule Making (Notice)[1] requesting comments on a proposal to amend Section 22.43(a)(1)[2] of the Commission's rules to allow certain Public Mobile Service applicants [3] to start constructing facilities after filing an application ("Form 401") and without receiving prior Commission authorization, as long as certain conditions are met. Under the current rule such applicants may not start construction until after the Commission has granted the application[4] and specifically authorized construction and operation of the proposed facility. *See* Section 22.43(a)(1) of the Commission's rules. The Notice was issued in response to a Petition for Rule Making (Petition) filed by the Radio Common Carrier Division of Telocator Network of America (Telocator). Nineteen parties responded, filing a total of sixteen comments and seven reply comments. *See* Appendix A. We have considered each comment and reply received, and all points of view have been taken into account in this order.

2. Section 22.43 of the rules governs the time for constructing Public Mobile Service facilities, specifying both the earliest date on which construction may begin, and the date by which the station must be completed and operational.[5] Section 22.43(a)(1) states that "the earliest date for commencement of construction" is the date a radio station authorization is granted.[6] Telocator proposed that PLMS applicants be allowed to commence construction immediately after filing an application (FCC Form 401). Telocator also suggested that applicants be required to obtain Federal Aviation Administration (FAA) approvals if necessary, prior to starting construction and that preconstructing applicants would assume the risk of not receiving an authorization.

3. In its Petition, Telocator argued that construction prior to authorization could provide significant benefits to the public as follows. First, it would allow applicants to start providing service to the public more quickly. Under the proposed rule, applicants could start construction ninety days after their application appears on public notice as acceptable for filing. Thus, some applicants would be able to complete construction and be ready to start operating as soon as the Commission issues an authorization. Second, the rule would result in lower costs to the public by giving more flexibility to those seeking to provide communication service and allowing for more efficient business planning. The proposed rule would make it easier to hire contractors and to consolidate construction projects, leading to reduced costs. Telocator further argued that the rule would be of particular benefit in those parts of the country where weather conditions make construction at certain locations either more expensive, or impossible during several months each year. Finally, the rule would benefit the public by removing unnecessary regulation which may slow the development of PLMS and cellular services.

4. Our Notice modified Telocator's proposal in several respects. First, we expanded the proposed rule to include cellular applications and applications for a Part 22 service proposing a modification of an existing application, in addition to applications in the PLMS. We also recommended restrictions, stating that an applicant could construct prior to receiving an authorization only if (1) a waiting period had passed, 90 days for a PLMS applicant and 60 days for a cellular tentative selectee; (2) no petitions to deny[7] or mutually exclusive applications had been filed; (3) the applicant did not request waiver of a Commission rule; (4) when required, the applicant had received antenna marking and lighting specifications from the Commission *(see* paras. 16-17 *infra);* (5) the proposed construction would not have a significant environmental effect;[8] and (6) the proposed site was far enough from the Canadian and Mexican borders to avoid conflicting with international agreements. In addition to adopting Telocator's proposal that the applicant would assume the risk of not receiving an authorization, we strengthened that proposal by adding that the applicant would assume the risk of having to relocate or dismantle a facility, and of incurring whatever costs might be necessary to bring the facility into compliance with Commission rules.

II. DISCUSSION

5. The comments strongly supported the proposed rule change. The commenters agreed that the proposed rule would provide the benefits discussed by Telocator,[9] that the restrictions were reasonable and that the Commission should adopt the rule. Of the the nineteen parties commenting, only two, Teletech and Vega, opposed adoption of the rule.[10] The commenters also proposed that we make several modifications. The suggestions included clarifying that the proposed rule also applied to modifications to existing authorizations requiring the filing of a Form 401 and that the proposed rule would permit only construction, but not operation, prior to the applicant receiving Commission authorization. Many commenters proposed modifications to the proposed 60 and 90-day waiting periods[11] and the requirement that antenna marking and lighting specifications be obtained from the Commission. Finally, two commenters, and Telocator in its reply comment, suggested that applicants who file mutually exclusive applications be required to serve their applications on the initial applicant.[12] This, they argue, would reduce the risk of illegal preconstruction by the

initial applicant. Based upon the comments received, and the reasons stated in our Notice, we will adopt our proposal with certain modifications. We have reworded several of the subsections of the rule to improve clarity.

A. General

6. In the Notice we stated that we would apply the proposed rule to all applications requiring prior Commission authorization (i.e., all applications that must be filed on a Form 401).[13] Several commenters suggested that we should add language to the rule expressly stating that the rule applies to applications for facilities modifications requiring prior approval. Some commenters also noted that the proposed rule section on cellular facilities uses the term "tentative selectee," which would not by its terms apply to an applicant for a facility change in the cellular service. We agree with these comments and have added appropriate language to the rule to make the rule more clearly applicable to all cellular and PLMS applications filed on Form 401 and to major amendments thereto.[14] Moreover, Southwestern Bell suggests adding that constructed stations cannot begin operation until after an authorization is granted. We agree with this suggestion and have added language to this effect to the rule.

B. PLMS Applications

7. In the Notice we proposed that a PLMS applicant could commence construction ninety days after its application was listed on public notice as acceptable for filing. The ninety day period is designed to include the thirty day period for filing petitions to deny, (Section 22.30(a)(4) of the rules), the sixty day period for filing mutually exclusive applications, (Section 22.31(b)(2)(i) of the rules), and an additional thirty days to cover the time it may take the Commission to place a mutually exclusive application on public notice.[15] If a petition to deny or a mutually exclusive application is filed, no construction is permitted under the new rule until the authorization is granted.

8. Some commenters, including McCaw and Telocator, argued that fifteen days was sufficient to allow for operation of the public notice system, and that the PLMS waiting period should be reduced to seventy-five days. We decline to adopt this suggestion. The Notice states that there is typically a two to four week lag between the time when an application is filed and the day it appears on public notice. A review of current processing times confirms our previous estimate. We therefore retain the ninety day waiting period for PLMS applications.[16]

C. Cellular Applications

9. *Initial Cellular Authorizations - 60 Days.* We will also retain the sixty day waiting period for initial cellular tentative selectees,[17] but for different reasons than those stated in the Notice. The sixty day period provided in the Notice was designed to include a thirty day period for filing petitions to deny and an additional thirty days to account for the time lag in issuing a public notice. However, as Telocator and US WEST point out, petitions to deny can be filed against a cellular tentative selectee up to forty-five days after the date of public notice. *See* Section 1.823(b)(2) of the rules.[18] Furthermore, McCaw argues that allowing an extra thirty days for publishing the public notice is unnecessary, since no new mutually exclusive applications can be filed against the tentative selectee, and petitions to deny must be served on the applicant.[19] McCaw suggests that an additional fifteen days is sufficient to ensure that the tentative selectee receives any petitions to deny. We agree with McCaw's suggestion. We therefore will retain the sixty day waiting period for cellular tentative selectees, based on a forty-five day period for filing petitions to deny and an additional fifteen days to ensure that the tentative selectee has received its service copy.

10. Some commenters suggested that we eliminate the waiting period for an applicant seeking the initial Block B (wireline) authorization in a market when there is only one eligible wireline applicant in that market or where there is only one surviving wireline applicant after a full-market settlement.[20] McCaw and Telocator opposed this suggestion. McCaw argued that such a rule would exacerbate the headstart problem already developing in the RSA's. Telocator states that equal waiting periods for wirelines and nonwirelines provide the most equitable approach.

11. We will not eliminate the waiting period simply because there is only one application for the initial Block B authorization. Such applications are still subject to petitions to deny. Under our proposed rule, applicants must wait until the petition period is over, and determine that no petitions to deny have been filed, before the applicant can begin to construct. We note that in the case of a sole applicant for the initial Block B (wireline) authorization in a market, a forty-five day waiting period would be sufficient to take care of our concern regarding petitions to deny. This is because Section 1.823(b)(2), which allows forty-five days for filing petitions to deny, applies only to tentative selectees chosen as the result of a random selection process. A sole applicant would not be subject to a lottery, and Section 1.823(b)(2) would not apply. The applicable provision would be Section 22.30(a)(4) of the rules, which allows only thirty days for filing petitions to deny. Thus the minimum waiting period for a single wireline applicant would be thirty days for petitions to deny, plus fifteen days to ensure service of the petition, for a waiting period of forty-five days. However, we concur with McCaw's and Telocator's suggestion that wireline and nonwireline applicants should be treated equally in this instance because there is no public interest reason for doing otherwise. Accordingly, we have adopted the same sixty day waiting period for single wireline applicants as we have required for initial cellular tentative selectees chosen by a random selection process.

12. *During the Fill - in Period - 45 Days* (Cellular Non-Permissive Changes in Facilities). Several commenters argued that there should be no waiting period for cellular applications for modifications to authorized facilities[21] which are filed during the five year exclusive fill-in period.[22] These commenters suggested that the applicant be allowed to start construction immediately after filing the Form 401 or immediately after the public notice is issued announcing that the application was filed. Centel argues that such modifications are routinely granted and seldom subject to petitions to deny. Telocator adds that immediate construction is already permitted without prior authorization when a licensee adds new facilities whose contours remains within the CGSA. We decline to eliminate the waiting period for cellular non-permissive changes. Under our proposed rule, construction prior to authorization is only allowed if no petitions to deny have

been filed. Therefore, there must be a waiting period at least long enough to cover the period for filing petitions to deny.

13. There remains the question of the proper waiting period for applications to expand the CGSA which are filed during the five year fill-in period. We have adopted a forty-five day waiting period for such applications for the following reasons. First, during the five year fill-in period, no mutually exclusive applications may be filed. Second, unlike the forty-five days allowed for filing petitions to deny against the tentative selectee, *see* Section 1.823(b)(2), the rules allow only thirty days for filing petitions to deny against non-permissive change applications, *see* Section 22.30(a)(4). Accordingly, we have allowed thirty days for filing petitions to deny, plus an additional fifteen days to ensure the applicant receives the petition to deny, for a waiting period of forty-five days.

14. *After the Cellular Fill - in Period - 90 Days.* After the five year fill-in period has expired, both applications to expand an existing CGSA (cellular non-permissive changes) and applications for an initial authorization to serve as yet unserved areas of the cellular market are permitted. *See* Sections 22.31(a)(1), (f) of the rules.[23] Furthermore, both types of applications are subject to competing applications. Accordingly, for cellular applications filed after the fill-in period, we will require the same ninety day waiting period as we currently require for PLMS applications.

15. *De minimis Extension Outside of Cellular Market.* We have also found it necessary to add an additional restriction to the proposed rule concerning cellular applications. Applicants proposing a *de minimis* extension of the CGSA beyond the borders of the cellular market, as allowed by Section 22.903 of the rules, may not construct prior to receiving a Commission authorization. All such applications must be reviewed prior to construction, because the Commission needs to determine whether the proposed extension is in fact *de minimis*. Accordingly, we will continue to require prior approval for these facilities before they may be constructed.

D. Air Safety Requirements

16. The Commission reviews radio tower proposals to ensure that the tower will be in compliance with air safety requirements. Applicants may be required to file notification of proposed construction with the FAA. If FAA notification is required, the Commission will consider FAA airspace advisories in determining marking and lighting requirements.

17. Before starting to construct under the proposed rule, applicants must obtain a determination from the Commission as to any antenna structure marking and lighting requirement. Many commenters proposed that marking and lighting specifications should be obtained only from the FAA. Commenters complained of long processing times and added that processing by two separate agencies was redundant. Section 303(q) of the Communications Act of 1934, 42 U.S.C. Section 303(q), authorizes the Commission to require marking and lighting of radio towers when, in the Commission's judgment there is a reasonable possibility that the towers may be a hazard to air navigation. Although the FAA sets standards for air navigation and has authority to issue a "notice of hazard to air navigation" regarding specific obstructions, including antenna structures, the FAA does not have authority to prohibit an antenna structure from being built. 49 U.S.C. § 1501, 1655 (c)(1). In light of these circumstances, we will maintain our requirement that applicants obtain antenna marking and lighting specifications from the Commission pursuant to Part 17 of the rules.

E. Environmental Issues

18. Under the National Environmental Policy Act of 1969, the Commission would be required to evaluate authorization requests which may have a significant impact on the quality of the human environment. Sections 1.1301 - 1.1319 of the rules outline Commission procedures for evaluating such impact. In the Notice we stated that all applicants shall determine whether their proposed facility may have a significant environmental effect as set forth in Section 1.1307 of the Rules, and shall indicate their determination in response to Question 32 of Form 401. We further stated that if the proposed construction may have a significant environmental impact, pre-authorization construction will not be allowed. No commenters objected to this proposal. Accordingly, we are adopting the environmental rule as proposed.

F. International Agreements

19. In the Notice, we stated that under an agreement between the United States and Mexico, coordination is required for cellular radio facilities located within forty-five miles of the Mexican border. Accordingly, we added a restriction to the proposed rule stating that cellular applicants could construct prior to receiving authorization if the facility was at least forty-five miles from the United States-Mexican border and met our other pre-authorization construction criteria. Pactel, however, notes that applicants could be allowed to construct prior to authorization, as long as their 39 dBu contours did not extend beyond the United States border. We agree with Pactel. Under the agreement, prior consent from Mexico is required only if an applicant's 39 dBu contour will extend beyond the United States-Mexican border. Cellular facilities whose 39 dBu contours do not extend beyond the border, are subject only to certain post-construction coordination requirements. The United States-Mexican agreement on cellular limits facilities to maximums of 100 watts effective radiated power and 500 feet above average terrain for stations within 45 miles of the common United States-Mexican border with power reductions for antenna heights exceeding 500 feet. Facilities outside of the 45 mile limit and exceeding 100 watts effective radiated power and 500 feet above average terrain may be subject to coordination with Mexico on a case-by-case basis.

20. Authorizations for cellular systems built within forty-five miles of the United States - Mexican border currently have the following condition attached:

> This authorization is subject to the condition that, in the event cellular systems using the same frequencies granted herein are authorized in adjacent territory in Mexico, coordination of your transmitter installations which are within 72 kilometers (45 miles) of the United States - Mexico Border shall be required to eliminate any harmful interference that might otherwise exist and to ensure continuance of equal access to the frequencies by both countries. The operator of this system shall not contract with customers in Mexico and further, users of the sys-

> tem must be advised that operation of a mobile unit in Mexico is not permitted at this time without the express permission of the Mexican government. The above conditions are subject to modification pending further notice from the Commission.

Accordingly, we have changed our proposed restriction which would have prohibited applicants from constructing cellular systems prior to authorization if the system was to be located within forty-five miles of the Mexican border. Instead, the rule adopted states that cellular applicants may construct prior to authorization only if the 39 dBu contour of the proposed system does not extend beyond the United States - Mexican border and meets our other pre-authorization construction criteria. We have also added a note to the rule advising applicants that if they construct a cellular system within forty-five miles of the Mexican border, or the 39 dBu contour extends into Mexico, any authorization that the Commission may later issue for that facility will include the condition quoted above.

21. There is also an agreement between the United States and Canada which requires coordination for PLMS facilities located near the Canadian border. Accordingly, our Notice proposed that PLMS applicants could construct prior to receiving an authorization, if their proposed facility was not between line A and the United States-Canadian border. *See* Sections 1.955, 22.117(b)(2) of the rules. No comments objecting to this proposal were filed, and we include this requirement in the rule.

22. This Commission and the Department of Communications in Canada also have an agreement regarding cellular facilities. The two agencies have agreed that the following condition will be attached to authorizations for cellular facilities located within forty-five miles of the United States-Canadian border:

> This authorization is subject to the condition that, in the event that cellular systems using the same frequency block as granted herein are authorized in adjacent territory in Canada, coordination of any of your transmitter installations which are within 45 miles of the U.S.-Canada border shall be required to eliminate any harmful interference that might otherwise exist and to insure continuance of equal access to the frequency block by both countries.

A note has been added to the rule advising applicants that if they construct a cellular system within forty-five miles of the Canadian border, any authorization that the Commission may later issue for that facility will have this condition attached.[24]

G. Miscellaneous Concerns

23. Both Vega and Teletech, the only commenters who opposed the rule expressed concern about pressure on the Commission to grant licenses to applicants that had constructed prior to receiving authorization, and consequent increased litigation. Vega further argued that the Commission might lose some of its control over the orderly management of radio resources, that some consolidation of construction jobs was already possible under the existing rules, and that the proposed rule was unnecessary. Teletech argues that many applicants wait until near the end of the construction period before starting to build their facilities, thus, making the rule change unnecessary. Teletech also argues that stations constructed prior to issuance of an authorization could present an air safety hazard, interfere with the pattern of existing AM broadcast stations or be operated prior to receiving grant of the Form 401 application.

24. In response to these concerns as well as some of the objections of Vega and Teletech, we observe that the proposed rule change does not involve a significant departure from current Commission practices. The Commission already permits considerable pre-authorization construction:

> [W]e have permitted, *inter alia*, the following steps to be taken prior to receipt of authorization to construct: site clearance, pouring of concrete footings for a tower, installation of a tower base and anchors, installation of a new power line, purchase and on-site storage (but not installation) of radio equipment and other "preliminary steps" not having an "intrinsic" radio communications use "related to the proposed facility."

MCI Telecommunications Corp., 3 FCC Rcd 509 (1988), *appeal pending on other grounds*. As NYNEX points out in its comments, such activities may amount to as much as seventy percent of the total cost of constructing a cell site. As suggested by NYNEX, the additional expense involved in setting up the antenna structure should not result in the creation of any pressure exerted on the Commission.[25] Second, Part 22 of the rules already allows construction without prior authorization of cellular modifications which do not expand the 39 dBu contours beyond the CGSA, Section 22.9(d)(7)(ii), and which add certain additional transmitter locations operating on the same frequency, Sections 22.9(d)(4) and 22.117(b).

25. The purpose of the rule is to allow greater flexibility in scheduling construction in those instances where such flexibility is needed. Furthermore, we have retained strict requirements for applicants who wish to construct prior to authorization. These requirements include: (1) the initial filing of a Form 401, (2) compliance with air safety requirements, and (3) a ban on pre-authorization construction if: a petition to deny or mutually exclusive application is filed; there is a request for waiver of a Commission rule; the construction may have a significant environmental effect; or the facility is close enough to United States borders to raise problems regarding certain international agreements. These requirements will ensure continued Commission control over the orderly management of radio resources. Finally, given the rule's clear statement regarding the assumption of risk, we do not agree that the Commission will be influenced to award licenses to applicants on a basis other than the public interest standard.

26. In response to the additional arguments raised by Teletech and Vega, we emphasize that the proposed rule involves no change in air safety procedures. Applicants still must file a Form 401, receive ASB clearance, and, if required, receive ASB marking and lighting specifications and obtain FAA approval, before construction can start. Moreover, since the applications will be placed on public notice, and we have retained a petition to deny period before construction can begin, petitions can still be filed

regarding any possible interference with an AM station, before construction begins.[26] In these circumstances, we conclude that the rule would result in a significant benefit to the public.

27. We do recognize that there may be some situations not contemplated by this new rule where commencement or continuation of construction should not occur. Therefore, we have added new subsection 22.43(d)(2)(ii) which makes clear we can order that construction not commence or continue if the public interest justifies such action. We intend that this subsection only be used in cases where there is a likelihood that the constructed facility, if completed and/or operated, would violate the Communications Act or our rules or where it becomes evident for any reason that the authorization may not be granted. The order to cease construction activities should only continue in force as long as the reason for ordering cessation persist. The order to cease construction would continue until a written revocation is issued. We believe this additional safeguard will prevent any unanticipated problems which could arise under the new rule.

III. REGULATORY FLEXIBILITY ACT - FINAL ANALYSIS

28. *Reason for action and objectives.* The Rule Making will allow cellular and PLMS applicants greater flexibility in planning and constructing new facilities and modifying existing stations. This increased flexibility should provide faster and more cost-efficient development of these public communication services. At the same time, the rule is designed to ensure that important regulatory concerns are met.

29. *Specific alternatives which could accomplish the same objective.* We are unaware of any specific alternatives which could accomplish the objectives sought to be achieved by the current rule making. The alternative adopted should reduce the current burdens all licensees experience in seeking to implement service.

30. *Issues raised by the public in response to the initial analysis.* The issues raised in the comments have been addressed in this order.

IV. PAPERWORK REDUCTION ACT STATEMENT

31. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information, collection, and/or record keeping, labeling, disclosure or record retention requirements; and will not increase or decrease burden hours imposed upon the public.

V. ORDERING CLAUSES

32. ACCORDINGLY, IT IS ORDERED that Part 22 of the Commission's Rules IS AMENDED as shown in Appendix B below;

33. IT IS FURTHER ORDERED that the rule changes made WILL BECOME EFFECTIVE **September 18, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments

ALLTEL Mobile Communications, Inc. (ALLTEL)

Bell Atlantic Mobile Systems, Inc.

BellSouth Corporation

Centel Cellular Company (Centel)

GTE Service Corporation

McCaw Cellular Communications, Inc.

NYNEX Mobile Communications Company (NYNEX)

Pacific Bell & Nevada Bell (Pacific Companies)

PacTel Cellular (Pactel)

PacTel Paging Inc.

Providence Journal Telecommunications, Inc.

Public Utilities Commission of the State of California (PUCC)

Southwestern Bell Corporation

Teletech, Inc. (Teletech)

Telocator

US West NewVector Group Inc. (US WEST)

Reply Comments

Bell Atlantic Mobile Systems

Centel Cellular Company (Centel)

McCaw Cellular Communications, Inc. (McCaw)

Palmer Communications, Inc.

Telecomm Systems, Inc. (Telecomm)

Telocator

Vega Cellular Consultants (Vega)

APPENDIX B

Proposed Rule Section

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 22.43 is amended by revising paragraph (a)(1), and adding a new paragraph (d), to read as follows:

Section 22.43 Period of construction.

(a)(1) *General rule.* Except as otherwise provided in Subsection 22.43(d), a radio station authorization shall specify the date of grant as the earliest date for commencement of construction.

* * * * *

(d) *Commencing Construction Prior to Grant of a Radio Station Authorization.*

(1) *Scope.* Subsection 22.43(d) applies to the following Public Land Mobile Service (PLMS) applicants and Domestic Public Cellular Radio Telecommunications Service (cellular) applicants and tentative selectees:

(i) applicants for an initial station authorization in the PLMS;

(ii) applicants for a non-permissive change, *see* Section 22.9 of the rules, of an existing station authorization in the PLMS;

(iii) applicants who have filed applications or amendments which request expansion of the reliable service area of a PLMS base station facility by less than one mile. *Cf.* Section 22.23(c)(2) of the rules;

(iv) cellular tentative selectees seeking the initial Block A (non wireline) or Block B (wireline) authorization awarded in a cellular market;

(v) the sole eligible wireline applicant, or sole surviving wireline applicant after a full market settlement, to apply for the initial Block B (wireline) authorization in a cellular market;

(vi) applicants seeking authorization to expand an existing Cellular Geographic Service Area (CGSA) pursuant to Section 22.9 of the rules, both during the exclusive five year fill-in period, *see* Section 22.31 (a)(1), (f) of the rules, and after the fill-in period has expired *Id.*; and

(vii) applicants seeking an initial cellular authorization after the exclusive five year fill-in period has expired. *See* Section 22.31(a)(1), (f) of the rules.

(2)(i) *General rule.* Once the applicant has filed a Form 401 with the Commission, and 90 days have elapsed from the date of the public notice listing the application as acceptable for filing, the applicant may commence construction provided that the requirements of Subsection 22.43 (d)(3) have been met.

(ii) Notwithstanding any provision of Subsection 22.43(d), if the Commission for any reason determines that construction should not be commenced or should be stopped pending the grant of an authorization the applicant shall cease construction upon receiving notification from the Commission. Notification may be made in writing or orally followed with a written confirmation. The notification of cessation of construction may be revoked in writing once the reason for making such notification no longer exists.

(3) *Conditions.* An applicant may not commence construction prior to the grant of an authorization as long as any of the following conditions persist:

(i) the application is mutually exclusive with another application or a petition to deny has been filed;

(ii) the applicant requests a waiver of a Commission rule pursuant to Section 22.19 of the rules;

(iii) the application proposes a *de minimis* extension of a CGSA beyond the borders of the cellular market, *see* Section 22.903 of the rules;

(iv) the applicant, where required, has not filed a notice of proposed construction with the FAA, or has not received a determination from the Commission as to any required antenna structure marking and lighting specifications;

(v) the applicant (or cellular tentative selectee) has not taken all of the following steps: (1) considered whether the proposed facility may have a significant environmental effect pursuant to Sections 1.1301-1.1319 of the rules; (2) determined that the proposed facility will not have such an effect; and (3) indicated this determination on the Form 401;

(vi) for a PLMS applicant, the proposed facility will be located between line A and the United States-Canadian border, *See* Sections 1.955, 22.117(b)(2) of the rules; or a facility to be operated in the 931-932 MHz band will be located in any of the areas indicated in Note C, *infra;* and

(vii) for cellular applicants (or tentative selectees) the proposed facility's 39 dBu contour will extend into Mexico.

(4) *Exceptions to the General Rule.*

(i) *Cellular Applications for the Initial Wireline and Non - wireline Authorizations to be Awarded in each Cellular Market.*

Cellular tentative selectees seeking the initial wireline or non-wireline radio station authorization to be awarded in a cellular market, *see* Subsection 22.43(d)(1)(iv), and the sole eligible wireline applicant, or sole surviving wireline applicant after a full market settlement, to apply for the initial wireline authorization in a cellular market, *see* Subsection 22.43(d)(1)(v), shall not be subject to the general rule set out in Subsection 22.43(d)(2)(i). Rather, once 60 days have elapsed from the date of public notice announcing the tentative selectee, or the sole eligible or sole surviving wireline applicant, the tentative selectee, or applicant, may commence construction provided that the requirements of Subsection 22.43(d)(3) have been met, except that in these circumstances the fact that mutually exclusive applications are pending shall not bar construction by the cellular tentative selectee.

(ii) *Applications to Expand an Existing CGSA During the Fill-In Period.*

Cellular applications to expand an existing CGSA during the fill-in period, *see* Subsection 22.43(d)(1)(vi), shall not be subject to the general rule set out in Subsection 22.43(d)(2)(i). Rather, once the applicant has filed a Form 401 with the Commission, and 45 days have elapsed from the date of the public notice listing the application as acceptable for filing, the applicant may commence construction provided that the requirements of Subsection 22.43(d)(3) have been met.

(iii) *Applications and Amendments to Expand the Reliable Service % Area of a PLMS Base Station by Less than One Mile.*

Applications and amendments which request expansion of the reliable service area of a PLMS base station facility by less than one mile, *see* Subsection 22.43(d)(1)(iii), shall not be subject to the general rule set out in Subsection 22.43(d)(2)(i). Rather, once the applicant has mailed the Form 401 to the Commission, the applicant may commence construction provided that the requirements of Subsection 22.43(d)(3) have been met.

(5) *Assumption of Risk.* Applicants who commence construction prior to receiving an authorization pursuant to Subsection 22.43(d), shall assume the risk of and have no recourse against the United States on account of:

(i) not receiving an authorization;

(ii) errors and time lags in the public notice system;

(iii) having to alter, relocate or dismantle the facility; and

(vi) incurring whatever costs may be necessary to bring the facility into compliance with applicable laws.

(6) *Commencing Operation.* Applicants constructing facilities without prior Commission authorization pursuant to Subsection 22.43(d), shall not commence operating such facilities until after the Commission issues an authorization and the applicant complies with the notification requirements of Section 22.9(b)(1) of the rules.

Note A. Pursuant to an agreement between the Commission and the Department of Communications in Canada, Commission authorizations issued for cellular facilities built within forty-five miles of the U.S. Canadian border shall have the following condition attached:

This authorization is subject to the condition that, in the event that cellular systems using the same frequency block as granted herein are authorized in adjacent territory in Canada, coordination of any of your transmitter installations which are within 45 miles of the U.S.- Canadian border shall be required to eliminate any harmful interference that might otherwise exist and to insure continuance of equal access to the frequency block by both countries.

Note B. Pursuant to an agreement between the United States and Mexico, Commission authorizations issued for cellular facilities built within forty-five miles of the United States - Mexican border, or whose 39 dBu contour extends into Mexico, shall have the following condition attached:

This authorization is subject to the condition that, in the event cellular systems using the same frequencies granted herein are authorized in adjacent territory in Mexico, coordination of your transmitter installations which are within 72 kilometers (45 miles) of the United States -Mexico Border shall be required to eliminate any harmful interference that might otherwise exist and to ensure continuance of equal access to the frequencies by both countries. The operator of this system shall not contract with customers in Mexico and further, users of the system must be advised that operation of a mobile unit in Mexico is not permitted at this time without the express permission of the Mexican government. The above conditions are subject to modification pending further notice from the Commission.

Note C. In the case of PLMS facilities to be operated on the 931-932 MHz band, pre-authorization construction will not be allowed if the proposed station is to be located within any of the following areas.

(1) Stations located within the area between line A or line C, as defined in Section 1.955 of the rules, and the United States-Canadian border.

(2) Stations located within 100 miles of the coordinates listed below.

(3) Stations located within 250 miles of the Canadian receive station coordinates listed below and within + 30 degrees of the given azimuth (from the Canadian station).

CANADIAN TERRESTRIAL MICROWAVE RECEIVERS REQUIRING PROTECTION

GEOGRAPHIC COORDINATES NORTH LATITUDE	WEST LONGITUDE	AZIMUTH FROM TRUE NORTH (DEGREES)
62° 35' 40"	140° 55' 36"	173.2°
61° 15' 13"	138° 48' 12"	312.2°
49° 33' 50"	90° 21' 15"	205.5°
49° 07' 07"	93° 55' 30"	265.4°
48° 48' 17"	123° 17' 06"	255.4°
48° 58' 18"	88° 18' 24"	221.7°
48° 45' 36"	92° 37' 03"	259.5°
48° 19' 11"	84° 04' 12"	192.5°
48° 27' 56"	81° 18' 14"	238.6°
47° 55' 08"	69° 23' 08"	222.1°
45° 16' 35"	74° 06' 06"	75.1°

FOOTNOTES

[1] Notice of Proposed Rule Making, 3 FCC Rcd 6306 (1988).

[2] For convenience, we have redesignated the new rule Subsection 22.43(d). We have also added a reference to this new subsection in Subsection 22.43(a)(1).

[3] The rule would apply to applicants in the domestic public cellular radio telecommunications service ("cellular") and the public land mobile service ("PLMS" or "non-cellular").

[4] Form 401 is the standard application form for new or modified PLMS and cellular facilities. *See* Section 22.9(a) of the rules. Under the present rule, applications to be filed on Form 401 involve facilities which may not be constructed without prior Commission authorization. However, as provided in Section 22.9(d) of the rules, there are certain cellular and PLMS facilities which do not require the filing of a Form 401, and which may be constructed without prior authorization so long as we are notified of the construction by the mailing of a Form 489 on the same day of the commencement of service.

[5] From the time an authorization is issued, PLMS applicants have twelve months, and most cellular applicants have eighteen months, to have a PLMS station or initial phase of a cellular system, constructed and operational. Sections 22.43(a)(2), (c)(2).

[6] Telocator notes that under Section 319(d) of the Communications Act of 1934, 42 U.S.C. 319(d), "[a] permit for construction shall not be required for stations licensed to common carriers, unless the Commission determines that the public interest, convenience and necessity would be served by requiring such permits." Although the Commission no longer issues "construction permits" to PLMS and cellular applicants, prior authorization is still required under Section 22.43(a)(1) of the rules prior to constructing facilities.

[7] Under our proposal, if a petition to deny is filed, an applicant may not begin construction until after receiving an authorization. However, once an authorization is issued, as long as no stay is ordered, the applicant may construct at its own risk, even if a petition for reconsideration or application for review is pending. *See* Section 1.102(b).

[8] *See* para. 18 *infra*.

[9] In addition to the benefits mentioned in Telocator's petition, Telocator and Telecomm filed comments stating that the rule would help alleviate competitive disparities between public and private mobile carriers. The comments stated that these carriers are in direct competition with each other, and public mobile applicants are at a disadvantage in providing new services in response to market demands because of longer application processing times.

[10] The Public Utilities Commission of the State of California ("PUCC") filed a comment noting that applicants in California were required to obtain state certification prior to construction. As long as this state requirement was unaffected, the PUCC had no objection to the proposed rule. We find that there is no conflict between California's state certification requirement and our proposed rule, since we require applicants to meet state requirements. *See* Section 22.13(f) of the rules.

[11] After an application is listed on public notice as acceptable for filing, the applicant still would have to wait a certain period of time before pre-authorization construction to ensure that no petitions to deny or mutually exclusive applications are filed against his application.

[12] A change in the service rules is beyond the scope of the present Rule Making.

[13] The universe of applications requiring a Form 401 is set forth in Section 22.9 of the rules; *i.e.*, all applications that do not constitute permissive changes. Facilities that do not require a Form 401 already may be constructed without prior approval. Section 22.9(d).

[14] Major amendments, which generally result in an application being treated as newly filed, *see* section 22.23, will be treated for purposes of this rule as new applications. That is, the proposed facilities, as amended, could be constructed prior to authorization pursuant to the conditions set forth herein. Conditions regarding waiting periods would be retriggered upon the filing of a major amendment to a Form 401 application.

[15] Most applications filed on Form 401 are listed on public notice. Among other things, the notice permits an applicant to determine if a mutually exclusive application has been filed.

[16] While they are minor modifications under Section 22.23(c)(2) of the rules, requests to expand the reliable service area of a PLMS base station facility by less than one mile are filed on a Form 401 and currently require Commission authorization prior to construction. However, such applications and amendments are not placed on public notice and thus do not require a waiting period. We will therefore allow such applicants to commence construction immediately after mailing the Form 401, provided that the requirements of Section 22.43(d)(3) of the rule are met.

[17] The sixty day waiting period applies only to those cellular tentative selectees chosen in the lottery for the initial Block A (non-wireline) or Block B (wireline) authorization to be granted in each cellular market.

[18] Telocator suggests that Section 1.823(b)(2) should be amended to reduce the period for filing petitions to deny from forty-five to thirty days. The proposed amendment of this section is beyond the scope of the current Rule Making and we thus decline to make such a change at this time.

[19] Under Section 22.30(a)(5) of the rules a petition to deny must be mailed to the applicant no later than the date on which the petition is filed with the Commission. *See also* Sections 1.47(b), 22.30(a)(2) of the rules.

[20] Since nonwireline applicants are not subject to the same eligibility requirements, and are not allowed to form pre-lottery settlements, there is invariably more than one applicant for the initial Block A (non-wireline) authorization.

[21] In the cellular service, an application to modify existing authorized facilities by expanding the CGSA or extending the 39 dBu contours beyond the CGSA are non-permissive changes, requiring the filing of a Form 401. *See* Section 22.9(d)(7)(ii) of the rules.

[22] After grant of a cellular authorization, the cellular grantee or licensees (and certain of their tranferees) have an exclusive five year fill-in period. *See* Sections 22.31(a)(1)(i), (f). During this period a cellular operator will be able to expand throughout the market without competing applications.

[23] Rules regarding the processing of such applications have not yet been adopted. Accordingly, the Commission is not yet accepting such applications. *Order*, DA 89-404 (Com. Car. Bur., released April 10, 1989). The ninety day period we are adopting assumes that post fill-in cellular applications will be processed in a manner similar to competing PLMS applications. Should the Commission decide otherwise, we reserve the right to modify this time period when the final processing rules are adopted.

[24] The Commission's agreement with Canada was based on cellular base station facilities operating at a maximum effective radiated power of 100 watts. Cellular systems employing base station facilities operating in excess of 100 watts effective radiated power may be subject to the coordination condition quoted above, at a distance greater than 45 miles.

[25] NYNEX argues this is especially true since the equipment is "fungible" and can be used elsewhere if the Commission denies an authorization.

[26] Teletech also expresses concern that applicants will use the proposed rule as *de facto* federal authority to construct in violation of local zoning laws. As we stated in response to the comments filed by the Public Utilities Commission of the State of California (PUCC), neither the proposed rule nor Commission authorization, constitutes such authority. Applicants are required to meet state and local requirements.

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Report and Order Allowing Public Mobile Service Applicants to Commence Construction After Filing Form 401, but Prior to Receiving an Authorization, CC Docket No. 88-475.

I support the changes in our existing procedures to allow cellular and conventional public land mobile radio service providers to construct their facilities after filing an application with the Commission, without obtaining prior Commission approval. Although I am willing to see how these changes work in practice, I still harbor the concerns expressed in my separate statement accompanying the Notice of Proposed Rulemaking. *(See* Concurring Statement of Commissioner Patricia Diaz Dennis in RM-5554, 3 FCC Rcd. 6306 (1988).) These concerns were also echoed in the comments. *(See* comments of Vega Cellular Consultants and of Teletech, Inc.) If these new procedures result in a significant number of interference complaints, or should any other problems arise, I will support reverting to the *status quo ante*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-3

In re Applications of

COLONIAL COMMUNICATIONS, INC.	File No. BPH-860801MB
BEDFORD CONCEPTS, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-860804ME
DONNA M. MacNEIL	File No. BPH-860804MF
APPLEDORE COMMUNICATIONS, INC.	File No. BPH-860804MI

For Construction Permit for a
New FM Station, Channel 243A
in Bedford, New Hampshire

Appearances

Martin E. Firestone and *Howard M. Weiss* on behalf of Colonial Communications, Inc.; *Terence L. Bruiniers*, on behalf of Bedford Concepts, A California Limited Partnership; *Richard F. Swift* on behalf of Donna M. MacNeil; *Barry A. Friedman* and *Michael Drayer* on behalf of Appledore Communications, Inc; and *Charles E. Dziedzic* and *Norman Goldstein* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
RICHARD L. SIPPEL

Issued: July 20, 1989; Released: August 3, 1989

PRELIMINARY STATEMENT

1. There are four mutually exclusive applicants for a construction permit for a new FM broadcast station on Channel 243A at Bedford, New Hampshire. The applicant parties are: Colonial Communications, Inc. ("Colonial"): Bedford Concepts, A California Limited Partnership ("Concepts"); Donna M. MacNeil ("MacNeil"); and Appledore Communications, Inc. ("ACI"). This was initially a fifteen party case designated for hearing under *Hearing Designation Order* DA 88-26 (released February 2, 1988), 3 F.C.C. Rcd 517 (1988), and published at 53 Fed. Reg. 3941 (February 10, 1988).[1]

2. The following issues which were set under the *Hearing Designation Order* remain to be decided:

> 1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 2. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

See Hearing Designation Order, *supra* at Para. 12. Also, the Bureau specified a comparative coverage issue with respect to possible significant differences in the sizes of the areas and populations which would receive service from the respective proposals. *Id.* at Para. 10.

3. By *Memorandum Opinion and Order*, FCC 88M-2179, released July 11, 1988, the Presiding Judge added the following issues against Concepts:

> A. To determine whether Bedford Concepts was timely organized as a limited partnership and if not whether its proposal should be accorded comparative consideration.
>
> B. To determine whether Bedford Concepts has failed to amend its application under §1.65 to report the withdrawal of two limited partners, whether such failure to report was material and intentional, and what effect such failure to report may have on Bedford Concepts' basic qualifications.

Concepts was assigned the burdens of proceeding and proof. *Id.*

4. A prehearing conference was held on April 14, 1988. *Order*, FCC 88M-535, released February 26, 1988. The Presiding Judge required that Integration and Diversification Statements be filed and exchanged by February 29, 1988, and that discovery commence by March 11, 1988. *See Order Prior To Prehearing*, FCC 88M-367, released February 12, 1988. Direct case hearing exhibits were exchanged on October 12, 1988, under *Order* FCC 88M-1137, released April 18, 1988, which set out the procedural and trial dates to govern in this case. Trial briefs were filed and exchanged on the added issues on October 21, 1988. *See Memorandum Opinion and Order*, FCC 88M-2179, *supra*. Hearing sessions were conducted on November 14, 15, 17 and 18, 1988, in Washington, D.C. The Presiding Judge established January 31, 1988, and February 28, 1989, as the dates for filing Proposed Findings of Fact and Conclusions of Law and Reply Findings of Fact and Conclusions of Law, respectively. *See Order*, FCC 88M-4003, released November 22, 1988.

5. The record was closed on November 18, 1988, except for the receipt of specified additional documentary evidence concerning promissory notes and documents showing proofs of federal express transmission of Concepts' documents. *Id.* Later, based on cause shown by the parties seeking the relief, documents of Concepts were received in evidence on January 4, 1989 (FCC 89M-14), documents of Colonial were received on January 4, 1989 (FCC 89M-15), documents of MacNeil were received in evidence on January 13, 1989 (FCC 89M-151), and rebuttal documents of ACI were received in evidence on February 1, 1989 (FCC 89M-354). The Bureau timely filed its brief on comparative coverage and the applicant parties timely filed their respective briefs on all issues and the case is ready for an initial decision.

6. This decision addresses first those issues which are qualifying and secondly the comparative issues. It is issued in accordance with the Commission's standards at 47 C.F.R. §1.267(b) (initial decision to include findings of fact and conclusions of law as well as reasons or basis therefore). The burden of proof on the issues are with the respective parties. This is an administrative proceeding tried under §5 of the Administrative Procedure Act [5 U.S.C.A §§551 *et seq.*] and the preponderance of the evidence standard applies. *Steadman* v. *S.E.C.*, 450 U.S. 91, 101 S.Ct. 999, 1007 (1981). References to exhibits shall be: "Colonial Exh. for Colonial Communications, Inc.; "Concepts Exh. _____ " for Bedford Concepts, A California Limited Partnership; "MacNeil Exh. _____ " for Donna M. MacNeil and "ACI Exh. _____ " for Appledore Communications, Inc. Testimony is cited where practicable by the name of the witness followed by the transcript page number, *e.g.*, "Smith, Tr. 0001." References to Proposed Findings of Fact and Conclusions of Law are designated "PFC" and references to Reply Findings and Conclusions are designated "RPFC."

FINDINGS OF FACT

7. Since the four applications are mutually exclusive, a consolidated factual hearing was conducted on all issues wherein the parties presented evidence and conducted cross-examination. *Ashbacker Radio Corp.* v. *F. C. C.*, 325 U.S. 327, 333 (1945).

QUALIFYING ISSUES

8. The special qualifying issues added against Concepts involve evidence on whether Concepts was timely organized as a limited partnership and whether Concepts failed to timely amend its application to disclose the withdrawal of two limited partners. The timeliness of the partnership's formation will effect whether Concepts' proposal merits comparative consideration. The failure to disclose withdrawal of limited partners, if material and intentional, could disqualify Concepts from any consideration for a Commission license. The Presiding Judge has determined preliminarily based on allegations of a competing applicant and the responses of Concepts to such allegations, that there has been a *prima facie* case made for adding the issues and that if the issues were not added and litigated here, there is a likelihood that the issues would be remanded. *See Armando Garcia*, 3 F.C.C. Rcd 1065, 1067 (Review Bd 1988). *See also Religious Broadcasting Network, et al.*, 3 F.C.C. Rcd 6216 (Review Bd 1988) (remand ordered to determine extent of lawyers' involvements). Thus, the ruling adding the issues was not a determination on the merits against Concepts' integration proposal or its basic character qualifications. But if that issue is resolved against Concepts, it would be disqualified from comparative consideration. *Louis Adelman*, 28 F.C.C. 432, 434 (Comm'n 1960), *aff'd sub nom Guinan* v. *F.C.C.*, 297 F.2d 782 (D.C. Cir. 1961) (basic qualifications of an applicant should be assessed before comparative analysis).

Concepts' Structure and Formation

9. Concepts has at all times relevant and in all of its filings with the Commission represented itself to be a limited partnership. Concepts relies as proof of its existence on a limited partnership agreement that is "dated as of July 30, 1986. (Concepts Exh. 7.)

10. Roger J. Metzler ("Metzler"), a principal in the law firm of Farrand, Cooper, Metzler and Bruiniers, which is counsel for Concepts, stated in a Declaration that the limited partnership agreement was prepared by him prior to July 30, 1986, that the application, with the exception of exhibits to be prepared by Mr. and Mrs. Shea, and the limited partnership agreement were sent by federal express to Mr. and Mrs. Shea on July 30, 1986, that at the time the application was filed it was proposed that H&D Telecommunication Services, Inc. ("H&D") would become a limited partner in the application, and that for this reason the broadcast interests of an H&D officer, Benjamin F. Dawson, were disclosed in the application. (ACI Exh. 12.) Mr. Metzler further stated that subsequent to the filing of the application, the Commission clarified its rules on the permissible activities of a limited partner[2] and that since Mr. Dawson was the engineer for the applicant, it was determined that he would not become a limited partner in Concepts. As a result, no amendment to the partnership agreement to add H&D Telecommunications Services, Inc. was prepared or implemented. (ACI Exh. 12.)

11. These operative facts are based on the Declaration of Concepts' agent, Mr. Metzler, and they are relied on by Concepts to show that when Concepts filed its application on August 4, 1986, H&D was intended to be a limited partner in the Concepts partnership. (*See* Concepts PFC at 6-7.) But at the time the application was filed, H&D was not disclosed as a limited partner on the Commission's application Form 301. And according to the testimony of the general partner, Philip Shea, Dawson and H&D were not to be included as limited partners when the application was filed. (Philip Shea, Tr. 732.)

The Partnership Agreement

12. Concepts' limited partnership agreement reflects the signatures of Philip J. Shea and Patrice M. Shea (collectively the "Sheas") as general partners and Chester Coleman ("Coleman") as the sole limited partner. It is dated "as of July 30, 1986." An attached schedule to the partnership agreement reflects the following:

SCHEDULE A

Names, Addresses and Initial Capital Contributions of Partners:

	Percentage Interest	Initial Capital Contributions
GENERAL PARTNERS		
PHILIP J. SHEA and PATRICE M. SHEA P.O. Box 2883 Woburn, MA 01888	20%	$20,000
TOTAL	**20%**	**$ 20,000***
LIMITED PARTNER		
CHESTER COLEMAN 1255 Post Street, #625 San Francisco, CA 94109	80%	$ 30,000**
TOTAL	**100%**	**$ 50,000****

* This contribution to be by a non-recourse Note accruing interest at 10% per annum.

** This contribution to be by notes payable upon demand of the Managing General Partners, such demand being accompanied by reasonable documentation showing the Partnership requires the amount demanded, plus the limited partner's agreement to loan additional amounts so that the contribution plus loans total $130,755.

(Concepts Exh. 7.) A one page document entitled State of California Certificate of Limited Partnership reflects signatures of the Sheas dated July 30, 1986, and a stamped filing date with California's Secretary of State of August 4, 1986. (Concepts Exh. 8.) But there is no reference in the certificate to the limited partnership agreement and so the date on the certificate does not corroborate that the limited partnership agreement was signed on or before August 4, 1986. The testimony of the principles therefore, if credible, must be the determinant.

The July 31 Events

13. The Sheas were vacationing in Newington, New Hampshire on July 31, 1986. Federal express bills and related account summaries establish that Mr. Shea received a package from San Francisco on July 30, 1986, and that he sent a package to his attorney in San Francisco on July 31, 1986, that was received in San Francisco on August 1, 1986. (Concepts Exh. 10.) The narrative account starts with Mr. Coleman, the limited partner, who is a resident of San Francisco. (Coleman, Tr. 760.) He signed the limited partnership agreement on July 30, 1986, in San Francisco. (Coleman, Tr. 761.) Coleman first saw the agreement in late July. There probably was a draft but Coleman does not know of the Sheas' involvement in the drafting process. (Coleman, Tr. 798-99.) Mrs. Shea was in a shopping mall in Newington, New Hampshire preparing to leave for Maine when she signed the agreement which her husband had picked up at a local federal express office. (Patrice Shea, Tr. 467.) The federal express package included the limited partnership agreement, the application Form 301, an engineering study, and a "cover note." Ms. Shea testified in that same context to the date of her signature on the California Certificate of Limited Partnership which appears on the document to be July 30, 1986. (Concepts Exh. 8.) She testified that the correct date was July 31, 1986, and that because of the fact that she and her husband were then "on vacation" they "couldn't really recall what day it was." (Patrice Shea, Tr. 468-69; 504-06.) The documents signed by the Sheas on July 31, 1986, including the limited partnership, were returned the same day *via* federal express for Mr. Metzler in San Francisco. Mr. Philip Shea essentially confirmed his wife's testimony that the limited partnership agreement and the "other application documents" were signed by the Sheas in Newington, New Hampshire on July 31, 1986. (Philip Shea, Tr. 551-54.)

The Misleading Application

14. After the application Form 301 was signed by the Sheas on July 31 and returned to Mr. Metzler in San Francisco, it was ultimately filed with the Commission on Monday, August 4, 1986. (ACI Exh. 9.) At Section II of Form 301, the Sheas were disclosed as the only general partners and were represented as holding 20% of the partnership equity and 100% of the voting control. (ACI Exh. 9, Sec. II, p. 2.) The Sheas' address was disclosed as P.O. Box 2883, Woburn, MA 01888. Disclosure of limited partner interests was made as follows:

Names and Residences - "Limited Partners"

Nature of Partnership

Interest or Office Held - "Limited Partners"

(Id.) These unidentified "limited partners" were represented to hold 80% of the partnership equity and 0% of the voting control. (ACI Exh. 9, Sec. II, 2.) It is found that the disclosed 20/80 equity split between the Sheas and Coleman was consistent with the allocation of equity ownership in the limited partnership agreement. (Concepts Exh. 7.) The application Form 301 was signed at the Section VII Certification by Philip J. Shea as general partner on a date represented to be July 30, 1986. As indicated by his testimony, the true and correct date was July 31, 1986. (Philip Shea, Tr. 551-54.)

The Partial Disclosure of Limited Partners

15. Although limited partners were not identified by name in Section II of Form 301, there was also submitted with the application an "Exhibit A" entitled "Response To Section II" with a sub-title "Other Broadcast Interests." In that document were disclosed the broadcast employment positions of Mr. Shea, the broadcast ownership interests of Mr. Coleman and H&D, Mr. Dawson's ownership interest in H&D, and Mr. Dawson's affiliation with a non-commercial applicant. (ACI Exh. 9.) It is noted that there was no cross-reference in the application's Section II disclosure which tied the broad disclosure of "limited partners" to Mr. Coleman and H&D in Exhibit A. When both documents (Section II and Exhibit A) are considered together, the reader would logically inquire whether Coleman and H&D and/or Dawson are the limited partners. But except for such an inquiry for specification, the reader is left to draw conclusions by surmise which could lead to a materially imprecise conclusion. For example, one could conclude that the limited partners were

Coleman and Dawson and that H&D was identified only to show Dawson's broadcast affiliations. Or one could conclude that Coleman and H&D were the limited partners and that Dawson was identified because his name appears on the engineering report and therefore his connection with the limited partner H&D was required. Or one could conclude that all three were limited partners, *i.e,* Coleman, H&D and Dawson. As a further illustration of the confusion caused, compare the disclosure of Mr. Metzler in his Declaration of April 28, 1988 (ACI Exh. 12) that at the time the application was filed, "it was proposed that H&D Telecommunication Services, Inc. would become a limited partner," with the disclosure in Concepts' proposed findings that because "there had been initial discussion about including the applicant's engineer, Benjamin Dawson, as a limited partner, an exhibit to the application [Exhibit A, supra] set forth the media interests of Mr. Dawson and his company [H&D]." (*See* Concepts PFC at 9.) Even counsel to the applicant who is closest to the operative facts has seen it both ways.

16. That was the condition of Concepts' disclosure when it lodged its application with the Commission on August 4, 1986. The application was prepared in San Francisco and was shipped to the Sheas for signature on July 31 while they were on vacation in New Hampshire. (Philip Shea, Tr. 732.) But on July 31, the Sheas knew that Dawson would not be included as a limited partner. (*See* Concepts' PFC at 9.) In that regard, Mr. Shea testified:

> Q. Was there any discussion with Mr. Metzler or did you raise a question with Mr Metzler as to whether or not, since you had the application in your possession to remove from it or delete from it Exhibit A, the reference to Mr. Dawson and H&D Communications?
>
> A. I didn't take that seriously because I knew we weren't including him and I didn't figure that counted in on the application.

(Philip Shea, Tr. 732.) Mr. Shea went on to testify that he relied on Mr. Metzler's judgment as counsel to the applicant for the ultimate decision but it appears that the need or propriety to remove the references to Dawson and H&D from the application were not specifically considered on July 31, 1986, by Mr. Shea in the conversations he had that day with Mr. Meltzer. (*Id.*)

The Ambiguities and Failure to Amend

17. Concepts conceded that "the ambiguity created by the inadvertent reference to Mr. Dawson and his company in the exhibit to the application should have been corrected." (Concepts PFC at 9.) It was an error that also had been noticed by Mrs. Shea (Patrice Shea, Tr. 540) and Mr. Coleman (Coleman, Tr. 782-85). While it is accepted as a fact that the Sheas were not advised by counsel or Coleman that an amendment was required, it is also found as a fact based on Mr. Shea's testimony, that the ambiguity about Mr. Dawson and H&D was not inadvertent. Rather, the ambiguity was one that was recognized but was left in the application because it was not taken seriously. (Philip Shea, Tr. 732.)

18. Nor was there any subsequent amendment filed by Concepts to clear up the erroneous filing. Concepts states its position in a trial exhibit:

> Exhibit A to the application was not revised before filing but since neither Mr. Dawson nor his company were listed as limited partners on the ownership schedule of the application it was not believed to be necessary to file any subsequent amendment to the application to reflect Mr. Coleman as the Limited Partner.

(Concepts Exh. 6.) There was an opportunity that would have logically called for an amendment to clarify and correct the application with respect to Dawson and H&D. On December 17, 1987, Concepts filed a Petition For Leave To Amend to report under §1.65 that Mr. Coleman, a limited partner, had filed an application with the Commission for a new FM facility in Maine. The amendment was accepted by the Bureau at the time the case was designated for a hearing. *See Hearing Designation Order, supra* at Paras. 8, 17. Concepts did comply with a directive in the designation order to file a properly executed copy of the amendment with the Presiding Judge. *Order*, FCC 88M-848, released March 28, 1988. But Concepts did not avail itself of any of several opportunities to correct its erroneous application. *See Memorandum Opinion and Order*, FCC 88M-2179, *supra* at 4 wherein the Presiding Judge added the issue:

> Nor has there been an explanation submitted by Bedford Concepts as to why it did not seek an amendment under §1.65 to report that two limited partners were with drawing because of their linkage to the engineering efforts in prosecuting the application. Since this additional information is needed to clarify Bedford Concepts' legal qualifications tied to date(s) certain, appropriate issues will be added.

Concepts' failure to accurately amend remained unchanged even after the trial on the added issue.

COMPARATIVE ISSUES

Media Diversification

19. Colonial is a corporation with voting stock that is 100% controlled by James Gold. Neither Mr. Gold nor Colonial has any ownership interest in any medium of mass communications. (Colonial Exh. 1.)[3]

20. Concepts is proposed as a limited partnership. Neither the Concepts legal entity nor any of its general partners has any interest in any medium of mass communication. Concepts' limited partner, Chester Coleman, is a 50% shareholder of Concord Area Broadcasting Corporation, licensee of KWAN-AM at Concord, California. (Concepts Exh. 4.) Because of the control over the application and related events on the part of Coleman, the limited partner's media interests are attributable to Concepts' application. *See* Findings at Paras. 50 to 56.

21. MacNeil has applied as a sole proprietor. MacNeil has no ownership interest in any medium of mass communication.

22. ACI is a corporation with voting stock that is 100% controlled by its chief executive officer, Steven A. Silberberg ("Silberberg"). (ACI Exh. 1.) Mr. Silberberg is the only Appledore principal with other media interests which he holds through his 33 1/3% shareholder interest in the Northeast Broadcasting Company, Inc. ("NEBCO"). In 1981, NEBCO acquired stations WHAV(AM) and WLYT(FM) at Haverhill, MA. (ACI Exh. 2.)

23. In February 1987, Montpelier Broadcasting, Inc. ("MBI"), a subsidiary of NEBCO, acquired Station WNCS(FM), Montpelier, Vermont. Montpelier is 250 miles from Bedford. (ACI Exh. 2, p. 1; Silberberg, Tr. 371, 378.) An application to upgrade WNCS to a Class C2 station is pending. (Silberberg, Tr. 376.) Appledore did not report this acquisition by amendment in the instant proceeding.

24. On August 10, 1988, Lisbon Communications, Inc. ("LCI") filed an application, still pending, for a new FM station at Lisbon, New Hampshire. MBI holds all of the non-voting stock of LCI. An amendment reporting this application was filed herein on September 13, 1988. (ACI Exh. 2, p. 1.)

25. In Exhibit 1 to its August 4, 1986 application, ACI stated as follows:

> Steven A. Silberberg is the Secretary, a Director, and 33 1/3% shareholder of Northeast Broadcasting Company, Inc., the licensee of Stations WHAV(AM) and WLYT(FM), Haverhill, Massachusetts. Mr. Silberberg will divest himself of this media interest in the event that the application of Appledore Communications, Inc. is granted."

Silberberg believes that "by virtue of" the foregoing divestiture commitment, he has effectively pledged to divest himself of any interests in MBI and LCI. (ACI Exh. 2., Silberberg, Tr. 284-89.)

26. NEBCO has been a profit-making business since 1984-85. Mr. Silberberg is paid a salary for supervising station manager, managing finances and seeking growth. Mr. Silberberg also supervised the operations of WHAV and WYLT and managed the financial and marketing plans of NEBCO as General Manager of the Haverhill stations. He has been involved with NEBCO since its inception in 1979. (Silberberg Tr. 325-27, 365; ACI Exh. 4, p. 2.)

27. Silberberg has testified that there are no understandings or agreements affecting the disposition of his NEBCO stock. (Silberberg, Tr. 328.) Silberberg also testified that he has not notified all of his fellow stockholders of his intention to sell and he acknowledges a requirement in a 1980 shareholder agreement that he do so since section II of that agreement, governing involuntary transfers, requires "immediate written notice to the corporation when a shareholder has any knowledge he might be forced to dispose of his stock." (Colonial Exh. 9, pp. 2, 3; Silberberg, Tr. 368-69.) The shareholder agreement also provides for a right of first refusal in favor of NEBCO or its designees that is designed to "preserve the closely held nature of the corporation." (Colonial Exh. 9, pp. 1-3; Silberberg, Tr. 368-69.) Any purchaser must take the stock subject to the same restrictions imposed on Mr. Silberberg.

28. Mr. Silberberg testified that the agreement contains mechanisms whereby the corporation and/or the other stockholders must buy out any stockholder who wishes to sell. He admitted that it is "technically possible" that no consensus could be reached on the terms of the "forced sale" in which case the corporation would have to be liquidated. (Silberberg, Tr. 334-42.)

Comparative Coverage

29. Under the comparative issue set in the *Hearing Designation Order*, the parties were required to submit comparative coverage evidence in order to permit consideration of the areas and populations within the respective Grade B contours and the availability of other primary aural services of Grade B or greater intensity.

Areas and Populations

30. The following are the total areas and populations which the applicant will cover within their respective 1 mV/m contours (Joint Engineering Exhibit 1):

Applicant	Area (Sq. km)	Population (1980 census)
Colonial Communications, Inc.	1,800	299,700
Bedford Concepts	1,770	284,900
Donna M. MacNeil	1,220	261,400
Appledore Communications, Inc.	1,730	262,500

Other Services

Daytime

31. During daytime hours, five or more aural services are available throughout the composite proposed service area.

Nighttime

32. Concepts and Appledore will provide a fifth nighttime service to an estimated 29 people residing within an area of approximately 1.4 square kilometers.

Standard Comparative Issue

Colonial's Integration

33. The findings of Colonial's diversification at Para. 19, *supra*, are incorporated here. Colonial is organized as a New Hampshire corporation with two classes of stock: voting and non-voting. James Gold is the president, secretary, treasurer and sole director of the corporation. He owns 101 shares of its voting stock which represents 100% of Colonial's voting stock. (Colonial Exh. 1.) Thus, Mr. Gold has numerical or *de jure* control.

34. HCC owns 100% of the non-voting stock. HCC is owned and controlled by John E. Hoover ("Hoover"), a New Hampshire resident. Hoover holds no position with Colonial and he will not serve as an officer or director. (Colonial Exh. 1.) Hoover does have prior experience as a communications lawyer. (Gold, Tr. 101.) His wife is HCC's vice-president. (ACI Exh. 7.) At the time of the trial, Hoover was not serving as Colonial's counsel. (Gold, Tr. 101.) But Hoover did furnish legal services for Colonial at the early stages of its application. Hoover explained the rules and regulations of the Commission to Mr. Gold at the pre-filing stages and he reviewed, made changes and typed Colonial's application Form 301. (Gold, Tr. 104-105.) On October 27, 1986, Hoover filed an amend-

ment with the Commission which was accompanied by a cover letter describing Hoover as "Attorney for Colonial Communications, Inc." (ACI Exh. 6.)[4] (Gold, Tr. 102-103.) While Mr. Gold admitted meeting with Hoover in 1986 to discuss Commission rules and regulations as they pertain to Colonial's application, Gold asserted the attorney-client privilege with respect to those conversations. (Gold, Tr. 105.) Hoover did seek out transmitter sites for Colonial but none of those sites were used. (Gold, Tr. 106.) And Colonial made use of a corridor study prepared by Cohen & Dupell that was provided without cost to Colonial by Hoover that analyzed prospective sites.

35. Colonial's application was filed on August 1, 1986. Beginning September 1, 1986 through October 1988, Daniel S. Coolidge ("Coolidge") was assistant secretary of Colonial. Colonial's application was never amended to reflect Mr. Coolidge's position with Colonial or his resignation. (Gold, Tr. 57-58.) Mr. Coolidge resigned from Colonial when Gold retained a new communications counsel. (Gold, Tr. 123-24.)

36. An opposing applicant notes that Colonial's engineer, Julius Cohen, was hired by Colonial on the advice of Gold's father who is in the broadcasting industry. (Gold, Tr. 44.) (*See* ACI PFC at 6-7.) Cohen was at that time also retained by HCC to seek the same station CP at Bedford. Cohen suggested that Gold and Hoover join forces (Gold, Tr. 47.) Gold contacted Hoover in June 1986, and Hoover agreed to participate with Gold in Colonial's application. Cohen stayed in as the engineer and provided the Cohen & Dupell corridor study referred to above on which Gold relied. (Gold, Tr. 46-48, 71-74.)

37. Mr. Gold was Colonial's incorporator and its initial registered agent. Hoover did not attend corporate meetings. (Gold, Tr. 59-60.) While, as indicated above, Mr. Hoover performed various legal services for Colonial, Gold retained Mr. Coolidge as local counsel who prepared the incorporation papers. (Gold, Tr. 49-50, 56, 76-78.) Gold chose the corporate name, selected the bank depository, and appointed himself as the sole signatory on the corporate checking account. Gold prepared a business plan and arranged for financing. The evidence indicates that Gold and Hoover have shared corporate expenses on the 51%-49% ratio that accords with their equity ownership. (Gold, Tr. 50, 66, 78-82, 95-89, 91, 94-95.)

38. Gold will participate full-time in the operation of the proposed station as its general manager. His duties will include the initial hiring of all station department heads and other key station employees. Gold will supervise and control all departments, including administrative, fiscal, programming, sales, and engineering. All station department heads shall report to him daily if necessary. Gold will supervise the station's day-to-day operations and he will set its policies. (Colonial Exh. 1.)

39. Gold is a resident of Bedford where he will continue to reside if Colonial's application is granted and where he has continuously resided since May 1981. From January 1977 to October 1977, he lived in Manchester, New Hampshire, a city that is within Colonial's proposed service area. And from October 1977 until September 1978, he resided in Bedford, NH. (Colonial Exh. 1; Gold, Tr. 30-31, 39-42.)

40. Mr. Gold graduated from high school in Maine in 1974. He attended the University of Denver and the University of Southern Maine where he concentrated on communications and business courses. (Colonial Exh. 1.) In 1976, Gold commenced his broadcast career as an account executive at Station WFEA(AM), Manchester, New Hampshire. In 1978, he joined the staff of WHCN(FM), Hartford, Connecticut as an account executive. He relocated to Stations WTIC(AM and FM) in Hartford in 1979, where he was also employed as an account executive. (Colonial Exh. 1.)

41. In 1981, Gold returned to Station WFEA as an account executive. He was promoted to local sales manager in 1983, and became general sales manager in 1984. In 1986, Gold served as acting general manager of WFEA for a period of six months. That same year, he became an account executive at Station WNDS-TV, Derry, New Hampshire, a position he continues to hold. He will relinquish all present employment to devote himself to the full-time operations of Colonial's stations if Colonial is awarded the CP. (Colonial Exh. 1; Gold, Tr. 67-71.)

Bedford Concepts' Integration

42. The findings with respect to the qualifying issue against Concepts at Paras. 9 to 18, *supra*, are incorporated here by reference.

43. Philip J. Shea, a general partner, proposes to work fulltime as general manager of the proposed station. (Concepts Exh. 2.) Mr. Shea was born in Cambridge, MA and he currently resides in Woburn, MA which is outside the Bedford service area. His wife, Patrice Shea, a Concepts general partner and proposed business manager, traffic manager, and sales director, also resides in Woburn. Both Sheas will relocate to Bedford if Concepts receives the grant. (Concepts Exh. 3.)

44. As general manager, Philip Shea will supervise the daily operations of the station. He will set station format and program content along with Concepts' other general partner, Patrice Shea, and he will establish operating policy and procedure. Mr. Shea's duties will also include establishing and supervising the station's public affairs policy and ensuring presentation of appropriate public affairs programming. (Concepts Exh. 3.)

45. Mr. Shea attended Northeastern University in Boston, Massachusetts. He majored in electrical engineering. He has held only technical positions at various radio stations. Presently, he is a studio supervisor/engineer at Station WEEI(AM), Boston, Massachusetts. Prior to his present position, Shea was a senior broadcast technician at Stations WRKO(AM)/WRKO-FM, Boston, Massachusetts, a position he held since 1977. At WRKO, Mr. Shea held supervisory duties and responsibilities for the studio and transmitter technical staff and he served as alternate chief engineer for the stations. He also provided technical support and production assistance on "a number" of programs for the Veterans of Foreign Wars entitled "Voice of Democracy." From 1970 to 1977, he was chief engineer at Station WRYT(AM), Boston, Massachusetts, where his duties included a complete rebuilding of the station's facilities and maintenance of those facilities. Mr. Shea was also involved in ascertainment of local issues and concerns for the station. (Concepts Exh. 3.)

46. In 1967, he was the engineer at Station WFMW-FM, Riverside, California, engaged in construction of the studio and transmitter site in addition to his technical duties. Prior to holding that position, Mr. Shea worked as an office assistant at Station WCOP(AM), Boston, Massachusetts on a part-time basis for approximately six months. Shea has also done periodic engineering consulting for other broadcast facilities. He has evaluated the network

and remote facilities of the Boston Red Sox baseball team. Mr. Shea holds a first-class radio-telephone operator's license. (Concepts Exh. 3.)

47. Patrice M. Shea will serve as the full time business manager-traffic manager-sales director, working on these tasks not less than 40 hours per week. (Concepts Exh. 3.) Her duties will include program scheduling, logging, hiring and supervision of station staff, joint responsibility for EEO complaints, supervision and direction of the sales effort for the station, and responsibility for the day to day financial management of the station. As a general partner she will also jointly determine the station's format and program content. (Concepts Exh. 2.) Ms. Shea was employed in 1982 for one year by the John Blair Agency, a media promotional agency in Boston. She is presently employed on a part-time basis in the admitting department at the Winchester Hospital in Woburn. (Concepts Exh. 3.)

48. There are other facts relevant to Ms. Shea's integration. Her duties as traffic manager are simply to log commercials. (Patrice Shea, Tr. 496.) Her role as business manager was self-described as taking on administrative tasks:

> As the business manager, I will be buying all of the supplies, watching the books. Of course, we'll have an accountant do the books, but I'll be watching - -.

(Patrice Shea, Tr. 495.) She did not show any particular confidence or familiarity with her managerial duties as sales director:

> A. As sales director, I'll be - - - say were dealing with a car dealership - - -.
>
> Q. Anything else?
>
> A. Well, I'll probably be helping with some sort of production, public affairs spots and things like that, because I used to work for a media agency.

(Patrice Shea, Tr. 496-97.) Ms. Shea also was unable to specify in her testimony how she would allot her time among three positions, thinking that it would present a more "detailed" proposal by specifying three managerial positions instead of just a general manager. (Patrice Shea, Tr. 495.) But it is noted that her husband Philip Shea is to be the general manager.

49. In the event that Bedford Concepts' application is granted, the Sheas will terminate all their other employment to devote full time to the construction, operation, and management of the Bedford facilities.

50. Chester Coleman, the sole limited partner of Concepts, is proposed to have no role in the management or operation of Concepts' proposed station. (Concepts Exh. 4.) It was Coleman who encouraged the Sheas to apply for the Bedford station. Philip Shea said that he did not have sufficient funds and Coleman offered to fund the venture. (Patrice Shea, Tr. 533, Coleman, Tr. 770-71.) Recognizing that he had attributable media interests, Coleman and his communications counsel proposed the limited partnership structure. (Coleman, Tr. 771; Patrice Shea, Tr. 477-78.)

51. Coleman suggested that the Sheas hire Mr. Metzler who was Coleman's communications counsel. (Philip Shea, Tr. 685.) Similarly, Coleman suggested Dawson as engineer, a person with whom Coleman had dealt as a business associate over the years. (Coleman, Tr. 763-65.) The Sheas used Dawson for engineering. Philip Shea had considerable engineering experience in his own right and despite his experience and other engineering contacts developed in his career, Philip Shea accepted Dawson without question. (Philip Shea, Tr. 687-88.)

52. Coleman paid Dawson directly with his own money. Coleman also paid the Commission's application fee. The evidence indicates that the Sheas and Coleman split the payment of Metzler's legal fees and Metzler represented both Coleman and the Sheas *vis a vis* partnership matters. (Patrice Shea, Tr. 503, 513-14; Philip Shea, Tr. 616; Coleman, Tr. 769, 772-73, 814.)

53. Coleman, as opposed to the Sheas, was the partnership principal involved in the decision to deny partnership interests to Dawson and Metzler. (Patrice Shea, Tr. 503.) The evidence shows that Coleman sent the partnership agreement and the Form 301 for the Sheas to sign while they were on vacation. The documents were signed and returned the same day. *See* Para. 16, *supra*.

54. Philip Shea located a site for the antenna tower, but Coleman negotiated a lease and paid $5,000 for an option on the land dated July 29, 1986. (Philip Shea, Tr. 593-97; Colonial Exhs. 5, 6.) Actually, the option on the land was in Coleman's name and under his control until he assigned it to the partnership on December 19, 1987. (Coleman, Tr. 809, Colonial Exh. 7-A.) The assignment was made at that time on advice of counsel. (Coleman, Tr. 809.) It is evident that on July 31, 1986, when Philip Shea had certified on Form 301, the option on the site was owned and controlled by Coleman. That gave Coleman considerable power over partnership decisions up until the time of the post-filing assignment.

55. Under the partnership agreement, the Sheas were to contribute $20,000 through a non-recourse note payable at 10% interest. (Concepts Exh. 7.) Coleman was to contribute $30,000 evidenced by a demand note which the Sheas could exercise as general partners but only after Coleman was presented with "reasonable documentation showing the Partnership requires the amount demanded." (*Id.*) That condition gave Coleman the power to approve partnership expenses in advance which is inconsistent with a non-attributable limited partnership interest. Coleman was hesitant to answer questions with respect to his power over expenses and his testimony in that regard is rejected. (Coleman, Tr. 803.) There are no promissory notes in the record and it appears that none was signed by Patrice Shea. (*See* Patrice Shea, Tr. 521-22.) Funds to meet expenses have been advanced on an as needed basis. Concepts opened a partnership bank account on March 30, 1988. (Patrice Shea, Tr. 509-10.) Coleman paid the filing fee when Concepts' Form 301 was filed. (Patrice Shea, Tr. 513.) Philip Shea testified that he executed a note for $20,000 but it was payable to Coleman. (Philip Shea, Tr. 576-77.) But the note was never produced. Shea testified that the note was in the nature of a line of credit that never was used by the Sheas. (Philip Shea, Tr. 577-78.) Coleman never executed a note in favor of the partnership. (Coleman, Tr. 800.)

56. The partnership agreement provides for Coleman to vote on the admission of additional general partners and his consent is required which is not subject to veto by the

Sheas. (Concepts Exh. 7 at 13.) There is no specific prohibition against removal of the Sheas as the general partners. (Concepts Exh. 7.) Coleman has voting rights to dissolve or wind up the partnership business and the general partners cannot dissolve the partnership without Coleman's consent. (Concepts Exh. 7 at 11, 18-19.)

MacNeil's Integration

57. Donna M. MacNeil is an individual female applicant and she proposes to be integrated as general manager on a full-time basis. MacNeil will have overall responsibility for the management of the station, including supervision of all department heads, proper coordination and functioning among the departments, and community relations with the town of Bedford. (MacNeil Exh. 1.)

58. MacNeil resides at 24 Wendover Way, Bedford, NH. In October 1966, she moved to Goffstown, NH which is located about ten miles from Bedford. In 1967, she moved to Manchester, NH about one block away from the Bedford town line. In 1972, she moved to her present residence in Bedford. She has lived within the 70 d/b/u contour of her proposed station for 22 years. (MacNeil Exh. 1.)

59. MacNeil has no broadcast experience. From 1967 to 1972, she worked with her husband in opening and operating twelve franchised Pizza Hut restaurants in New England. Her primary duties were in keeping books and records, managing office staff, and assisting with restaurant operations when needed. (MacNeil Exh. 1.)

60. From 1972 to 1975, MacNeil was a member of the Executive Board and Treasurer of the Elliot Hospital Junior Associates and from 1975 to 1978, she was Chairperson of the Finance Committee of the Elliot Hospital Senior Associates. Elliot Hospital is located in Manchester, New Hampshire, which is within the 60 d/b/u service contour of MacNeil's proposed station. During her seven years as a Junior or Senior Associate she performed in excess of 1,000 hours of volunteer work for the Hospital. The Junior Associates raised funds for Elliot Hospital used in part to purchase needed medical equipment and in part to fund other Hospital projects. The Finance Committee of the Senior Associates administers trust funds for the Hospital which are directed to assist people in the Hospital with their medical expenses as well as to purchase medical equipment and to fund Hospital projects. For ten years MacNeil has been a member of the Bedford Presbyterian Church Unity Club which is a fund raising and social organization of the Church. (MacNeil Exh. 1.) MacNeil's general store periodically conducts fund raising activities to raise money for charitable organizations such as Easter Seals and the West Manchester and Bedford Rotary Clubs (MacNeil Exh. 1).

61. Since 1978, MacNeil has been the self-employed manager of MacNeil's general store and ice cream parlor in Manchester. MacNeil is responsible for bookkeeping, ordering, hiring and firing employees, public relations, and facility maintenance. Her husband presently assists her in the store business and in the event she is awarded a construction permit for the Bedford radio station, he is prepared to assume its management. (MacNeil Exh. 1.) MacNeil represents that in the event of a grant of MacNeil's application she will terminate her outside employment and all other activities as necessary to fulfill her integration commitment. (MacNeil Exh. 1.)

62. MacNeil's interest in a broadcast station was in part engendered by the moral support and technical assistance afforded her by Mr. Gary Howard ("Howard"). As indicated above, Ms. MacNeil's business time has been spent in assisting her husband's Pizza Hut business and in the family country store and ice cream parlor venture. Mr. Howard holds a permit for an FM station at Meredith, NH which is about one hour from Bedford. But Mr. Howard resides in Bedford and his wife and daughter have worked in MacNeil's store. (MacNeil, Tr. 146-47, 153.) Mr. Howard suggested an engineer and a communications attorney both of whom were retained by Ms. MacNeil. Mr. Howard also reviewed each item of her Form 301, provided her with cost estimates and staffing needs, and also furnished her with referral sources for meeting EEO requirements. (MacNeil, 151-54.) Mr. Howard also sought out the site which MacNeil utilized and he met with the owner's wife about the site's availability. However, when in May 1988, there were inquiries made by other applicants about reasonable assurance, Ms. MacNeil became personally involved. Although Mr. Howard accompanied her to visit the site owner, the evidence establishes that she was responsible for obtaining the reasonable assurance and when "problems arose" she made the contact herself. She asked Mr. Howard to accompany her on a personal visit because when he went earlier, Mr. Johonnett, the tower owner, was out-of-town. (*Id.*) It certainly made sense for her to have Mr. Howard present at the second visit so that any misunderstandings from Howard's first contact could be immediately clarified. Mr. Howard did not expend any monies but neither was he paid for his services. (MacNeil, Tr. 153-54.) Nor is he expected to work at the station. (MacNeil, Tr. 163, 169.)

63. With respect to MacNeil's site, Mr. Howard assisted in the site's selection starting with his review of maps of the local areas in the town office. (MacNeil, Tr. 153-54.) While Mr. Howard recommended the site, Ms. MacNeil contacted the landowner, Mr. Hersey. (MacNeil, Tr. 154.) At a time when Mr. Hersey became concerned about the use of his land, he went to see Ms. MacNeil at her home and she met his concerns with respect to the encroachment of wire lines. (MacNeil, Tr. 200.) While Mr. Hersey was the owner, Mr. Johonnett was the contact person. (The site proposal was to side-mount on Johonnett's tower which is on Hersey's land.) Mr. Howard made the initial contact with Mr. Johonnett. Ms. MacNeil also spoke with Mr. Johonnett. She asked Mr. Howard to accompany her for that purpose. (MacNeil, Tr. 203.) The questions raised about site availability were ultimately resolved in MacNeil's favor. *See Memorandum Opinion and Order*, FCC 88M-2134, released July 8, 1988, and *Order*, FCC 88M-2517, released August 3, 1988. The evidence recited in this finding goes towards establishing that Ms. MacNeil was in control of the application process in securing and retaining the reasonable assurance of her antenna site.

64. There is relevant evidence to consider regarding MacNeil's ability to carry out her proposed integration. The evidence establishes that she has no broadcasting experience or educational background in communications. She also has worked closely with her husband in his business ventures (Pizza Hut franchises; general store-ice cream parlor; aviation transport business; real estate development). Her participation in these ventures, all apparently successful, has been limited to office management, bookkeeping and staff supervision and hiring. (MacNeil Exh. 3; MacNeil, Tr. 145-46, 149-50, 172-78,

186-87, 214-15.) The weight of this evidence supports a finding that Ms. MacNeil has shown a capacity to manage essential elements of various business enterprises. This evidence does not detract from her ability to carry out her proposal.

65. There is also evidence presented that raises some question about whether her husband will control the station. (*See* Colonial PFC at 28-29.) MacNeil testified that she will keep her husband apprised of developments at the station. (MacNeil, Tr. 167-68.) The expenses incident to the application were paid out of a joint bank account which is in accord with their practice to own their marital property jointly. (MacNeil, Tr. 149-50.) The country store-ice cream parlor is owned solely by Ms. MacNeil which is consistent with her applying for a broadcast station as a sole proprietor. (MacNeil, Tr. 150.) It is established by the weight of the evidence that Ms. MacNeil and her husband consult each other regularly about business ventures in which each is interested as a proprietor. But that evidence does not detract from Ms. MacNeil's proposal to operate the station as sole proprietor, particularly in view of her hands-on management and operation of her country store-ice cream parlor.

66. There also is evidence presented on the credibility of MacNeil's commitment to leave her current business and devote full time to a broadcast station. (*See* Colonial's PFC at 29.) She is currently working 60 to 80 hours per week at the country store-ice cream parlor. (MacNeil, Tr. 174.) Ms. MacNeil testified that if she wins the grant, she will cease working at the store and her husband will take over as the store's manager. (MacNeil, Tr. 176.) The MacNeil's own the store building. Therefore, as an alternate plan, if MacNeil's husband chose not to run the store, the store would be leased and the lease either would include the operation of the business or the space would be leased for another business. (MacNeil, Tr. 172-78.) Colonial notes that Ms. MacNeil testified at one point that they would not sell or lease the store (MacNeil, Tr. 188) and later testified that the store was listed for lease or sale. (MacNeil, Tr. 216.) The implication that Ms. MacNeil contradicted herself is rejected. The testimony, while not altogether clear, accounts for MacNeil's intentions as long as she owns the store, i.e., to run the business through her husband or to sell or lease it if he reneges. In order to be prepared for the latter alternative, the building has been listed for sale or lease. Thus, it appears that to the extent possible, MacNeil has prepared for the contingencies of a winner.

67. Colonial also seeks to raise evidentiary inferences about MacNeil's capability to perform as the station's general manager. (Colonial's PFC at 25, 54-55.) Ms. MacNeil testified that she would hire a station manager as a full-time employer to "oversee" all other station employees. That makes sense for someone who does not have broadcast experience. But she said that because she had no experience in the broadcasting business she was not sure whether the station manager would determine program format. (MacNeil, Tr. 157-58.) That answer seems truthful and candid. She also testified that her program manager would set up the programming and that task suggests the creation of a format. (MacNeil, Tr. 160.) MacNeil testified that she planned to hire people who would sell advertising but that if she did not have sales people, she was prepared to do the selling herself. (MacNeil, Tr. 158-59.) She would not be the station's announcer and the program manager would select guests to appear for public affairs programming. (MacNeil, Tr. 161.) There is nothing in her testimony to establish that she was incapable of managing a station and MacNeil has established through her experiences in her husband's enterprises and her independent operation of her store that she has at least a minimum business management capability, if not more.

ACI's Integration

68. The findings of ACI's diversification at paras. 22 to 28, *supra* are incorporated here. ACI is a corporation formed under the laws of the State of New Hampshire The articles of incorporation were filed with the Secretary of State (NH) on July 25, 1986. On July 28, 1986, the corporation adopted its bylaws. The corporation has only one class of stock, voting common. (ACI Exh. 1.)

69. Silberberg is the chairman of the board and a director. He holds all of the shares of the issued common voting stock. Silberberg's wife, Jane W. Silberberg, is the president and a director. However, she holds no stock in the corporation. Patricia F. Rigby is the Secretary, Treasurer, and a director of Appledore. She, likewise, holds no stock in ACI. (ACI Exh. 1.)

70. Silberberg was born in Manchester, NH which is within the predicted 70 d/b/u contour of the proposed station. He grew up in Manchester and now lives at 12 Flintlock Road, Bedford, NH, the city of license. (ACI Exh. 4.) After completing his secondary education, he attended college in Boston where he received an undergraduate degree at BU and then attended the University of New Hampshire where he received an MBA. He returned to Boston, received a JD degree from BU and was admitted to the NH bar in 1975. While at school in Boston, Mr. Silberberg spent his summer vacation at his family farm in Manchester. Similarly, while in Washington, D.C. on an intership, he continued to vote in NH and he used the family address in Manchester as his home of record. (ACI Exh. 4.)

71. After his internship, Silberberg was employed by Northeast Broadcasting Company, Inc. ("NEBCO"), a minority-owned venture that was seeking entry into the broadcasting industry. While at NEBCO, the firm acquired Stations WHAV(AM/FM) at Haverhill, MA through the Commission's distress sale program. The stations were acquired in 1981. Silberberg was responsible for supervising operations and he directed the financial and marketing plans. From 1983 to 1987, he was the general manager of the stations. In 1987, NEBCO acquired a station in Montpelier, VT and Silberberg assumed supervision of new general managers appointed at all stations. He also managed finances. (ACI Exh. 4.)

72. Silberberg returned to Bedford in 1984. There he became an assistant Den Father with the local Cub Scout Troop to which his son belonged. (Silberberg also assisted in activities of the Bedford Little League program and the Bedford Junior Soccer League. (Silberberg, Tr. 229.) Silberberg characterized himself as a "senior helper" for both leagues "by taking an active role and ensuring that the leagues function properly." (Silberberg, Tr. 293-94, 299-300.) Silberberg testified that he and his wife have started a new Brownie troop. (ACI Exh. 4.)

73. Silberberg has participated in the Young Leadership Group of the Manchester Jewish Federation ("Federation") for more than three years. He is currently chairman of the social action committee, which is concerned

with injustice and social concerns in the community. He also is currently chairman of a portion of the organization's annual fundraising campaign. (Silberberg, Tr. 307.) The Federation is a nonprofit corporation located at a fixed address in Manchester. (Silberberg, Tr. 305-06.) Mr. Silberberg is also a founder of the Monadnock Preservation Associates, which seeks to preserve the historical and architectural legacy of the Monadnock region of New Hampshire. (ACI Exh. 4.)

74. In the event ACI's application is granted, Silberberg will remain a resident of Bedford. He will discontinue his present commitments to NEBCO, his legal practice, and his other business activities that would prevent him from managing the radio station on a full-time basis. (ACI Exh. 3.)

Auxiliary Power

75. Each of the four applicants proposes to install auxiliary power equipment at the studio and transmitter sites in order to keep the respective proposed stations on the air in the event of a local power failure. (Colonial Exh. 2; Concepts Exh. 5; MacNeil Exh. 2; and ACI Exh. 5.)

CONCLUSIONS OF LAW

76. Section 307(b) of the Communications Act of 1934, as amended, (the Act) requires the "fair, efficient and equitable distribution" of broadcast service. Therefore, an assessment of the evidence must be made under the applicable Commission standard in determining which applicants meet the statutory standard. *See Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965).

77. The primary concerns under the Act are: (1) maximum diffusion of control of the media of mass communication or diversification and (2) best practicable service to the public. *West Michigan Broadcasting Co.* v. *F. C. C.*, 735 F.2d 601, 603-607 (D.C. Cir. 1984) (process of comparative evaluation). Thus, comparative credit will be awarded to applicants which are without other media interests. The "best practicable service" standard includes the integration of ownership into management which may be enhanced by local residence, civic activities, broadcast experience and, if applicable, minority and female gender preferences. However, before conducting the comparative analysis, a determination of the basic qualifications of Bedford Concepts must be made. *Louis Adelman*, 28 F.C.C. 432 (1960), *recon. denied*, 29 F.C.C. 1223 (1960), *aff'd sub nom Guinan et al*, v. *F.C.C.*, 297 F.2d 782 (D.C. Cir. 1961).

Bedford Concept's Basic Qualifications

78. The evidence in the findings above, establishes that all persons in control of Concepts' application, Metzler, Philip Shea and Coleman, cared not one wit whether the application accurately disclosed the limited partner(s). The evidence establishes that only the words "limited partners" were typed in the legal qualifications section of Form 301 which specifically calls for names and residence addresses. But on August 4, 1986, when the application was filed, there was only one limited partner contemplated: Chester Coleman. Yet the Exhibit A attachment to Form 301 mentioned by name the H&D Telecommunications Services and its principal, Benjamin F. Dawson, as limited partners at a time when Philip Shea and his communications counsel and Chester Coleman knew that H&D and Dawson would not be limited partners. In fact, the limited partnership agreement (which was dated "as of July 30, 1986" but which was executed on July 31, 1986) listed only Chester Coleman as the sole limited partner. Philip Shea knew that the application was affirmatively erroneous with respect to disclosure of limited partnership interests for H&D and Dawson but the error was admittedly not taken seriously by Philip Shea. Since he was relying on counsel at the critical day of filing, when the Sheas were on vacation, Concepts' counsel also was not taking the disclosure seriously. That attitude of total indifference to accuracy in disclosure has persisted to the present inasmuch as there has been no corrective amendment offered, even when Concepts had an occasion to amend in December 1987.

79. The Commission has stated what it expects of the character of its applicants:

> As observed previously, the scope of the Commission's character inquiry will now focus on those aspects of an applicant's character that relate to its proclivity for truthfulness in dealing with the Commission and its propensity for complying with our rules and policies.

Character Qualifications, 102 F.C.C. 2d 1179, 1231 (Comm'n 1986). The Commission has rejected character for comparative analysis. *Id.* But at the same time, it took care to retain an inquiry into "character as an element of the licensing process." *Id.* at 1189. Because there is a predictive element to the application process, the Commission "looks for clues as to risks and to evidence as to expectable performance." *Id.* The pivotal traits are those of "truthfulness" and "reliability" which can only be determined through observations of "behavior." *Id.* at 1190. Another related element is the need for taking adverse action against an applicant when "the deterrent effect of our actions helps to ensure future reliability and truthfulness." *Id.* at n. 26. *See also F.C.C.* v. *WOKO*, 329 U.S. 223, 228 (1946). A restriction imposed on the scope of the inquiry is to limit it to "only misconduct relevant to operation of broadcast stations." 102 F.C.C. 2d at 1190.

80. Against the Commission's formula for character consideration as outlined above, the facts show that Concepts misled the Commission in a material way by not removing the reference to Dawson and H&D as limited partners when it filed its application. Concepts knew at that time that Dawson and H&D would not be limited partners because they were providing engineering services and therefore their broadcast interests would be counted for attribution purposes. *See Ownership Attribution*, 58 Radio Reg. 2d (P&F) 604, 618 (limited partners must refrain from involvement in any material respect in the operation of media activities). There are few other activities more material to media operations than engineering input. *Compare Reexamination*, 1 F.C.C. 2d 802, 804, a ruling released on November 28, 1986, confirming that limited partners who provide legal services to an applicant will be attributed. Concepts disclosed in its application that its engineers were limited partners, a factor material to the application process and considerations of diversification, when in fact there was a concerted decision to exclude them as limited partners in order to avoid attribution. Their exclusion as partners is established factually by their omission from the partnership

agreement that was executed on July 31, 1989. But nothing was done to change the Form 301 when it was in the process of being signed. Nor was there any subsequent effort to amend. And the responsible principals knew of the inaccuracy at the time of certification and filing yet did nothing because admittedly, it was not taken seriously. The materiality of the erroneous disclosure and the knowing refusal to be bothered with making the corrections focus the events of misleading disclosure in August 1986 and failure to amend in December 1987, and thereafter, as behavior establishing untruthfulness and unreliability. Further, in view of the intentional disregard for precision in filing shown by Concepts, there is a public interest need to deter such conduct in the future. Such a prophylactic remedy is applicable here where the disclosure was affirmatively misleading as contrasted with a mere oversight in a failure to disclose. Therefore, Concepts is found to be unqualified as an applicant. These are circumstances reflecting intentionally reported false information and subsequent intentional or significant careless inattention to amendment obligations under §1.65.[5] *Merrimack Valley Broadcasting, Inc.*, 55 Radio Reg. 2d (P&F) 23, 25 (Comm'n 1983), *modified* 99 F.C.C. 2d 681, 683-84 n. 9 (Comm'n 1984). The Commission specifically noted in its modification ruling that "circumstances surrounding a particular violation which indicate significant carelessness or inattentiveness may warrant inquiry even where no evidence of repeated violations is present." *Id.* Concepts, not its counsel, was responsible for insuring the accuracy of its application and compliance with §1.65 of the Commission's rules. *WADECO* v. *F.C.C.*, 628 F.2d 122 (D.C. Cir. 1980). While it is concluded by the undersigned that the circumstances found here disqualify, Concepts' application will be comparatively assessed below for the contingency of appeal.

81. Thus, under the above analysis, Concepts is determined to be disqualified under the second added issue concerning its failure to maintain an application that is "substantially accurate and complete in all significant respects" under §1.65. Concepts was not charged with filing a false and misleading application but those findings and conclusions are relevant to showing intent and/or recklessness and those elements support this holding under *Merrimack Valley*.[6] But the first added issue on whether Concepts was timely organized as a limited partnership is resolved in favor of Concepts. *See Mark L. Wodlinger, et al. (Billings)*, 3 F.C.C. Rcd 3139, 3140 (Review Bd 1988) (failure to file certificate of limited partnership by "B" cut-off held not to be a determinant to timely formation of limited partnership). *Compare Pacific TV, Ltd.*, 2 F.C.C. Rcd 1101, 1102 (Review Bd 1987), *review denied*, 3 F.C.C. Rcd 1700 (Comm'n 1988) (partnership not recognized where, *inter alia*, agreement was executed after "B" cut-off).

COMPARATIVE CONCLUSIONS

Diversification

82. Maximum diffusion of control of the media of mass communications is a factor of primary significance in the comparative adjudication process. *See Policy Statement*, 1 F.C.C. 2d 393, 394 (Comm'n 1965). Colonial and MacNeil have no attributable media interests. *See* Paras. 19, 21, *supra*. Therefore, each qualifies for a substantial comparative preference over Concepts and ACI. Concepts is charged with the attributable media interests of limited partner Coleman and ACI is attributable with the media interests of Silberberg.

Concepts' Media Interests

83. The evidence in the findings establishes that Coleman made key decisions effecting the filing and prosecution of Concepts' application. He solicited the Sheas to serve as general partners, he provided up-front money, he arranged for communications counsel and an engineer, he decided that counsel and the engineer not be limited partners (a decision that the Sheas were not even privy to), he was the prime mover in the application's preparation (giving the Sheas only one day to sign and return it while on vacation), he obtained and controlled the transmitter site, and he had the authority under the limited partnership agreement to approve and disapprove expenditures. Under circumstances such as these, where it can be inferred that limited partners will exercise influence or control over an applicant's ongoing business, an integration proposal will be rejected. *Compare Victory Media*, 3 F.C.C. Rcd 2073, 2075 (Comm'n 1988) (non-voting shareholders). *See also Progressive Communications, Inc.*, 3 F.C.C. Rcd 5758, 5762 (Review Bd 1988). And in order to avoid media attribution, the limited partner must be merely a passive investor with no control over the licensee. *Payne Communications, Inc.*, 1 F.C.C. Rcd 1052, 1054-55 (Review Bd 1986). The evidence cited above establishes that Coleman was not passive. Also, there is no express prohibition against Coleman's involvement in removal of the Sheas as general partners on grounds other than those provided under the Commission's holdings in *Ownership Attribution*, 58 Radio Reg. (P&F) 604, 619-20 (Comm'n 1985). Thus, under *Payne Communications*, *supra*, Coleman's media interest is attributed to Concepts. *See also Doylan Forney, et al.*, 3 F.C.C. Rcd 6330, 6333 (Review Bd. 1988).

ACI's Media Interests

84. An applicant's other media interests will be afforded non-recognition status if the applicant pledges prior to "B" cut-off to divest of the media interests held on that date. Then the media interests will not be charged to the applicant and the divestiture will not be considered as comparative upgrading in prejudice to any competing applicant. *See Hugh M. McBeath*, 59 Radio Reg. 2d 1159, Review Bd Slip Op. FCC 86R-3, released January 28, 1986 (divestiture pledge must be made at the "B" cut-off date). *See also Santee Cooper Broadcasting Co.*, 99 F.C.C. 2d 781, 794 (Review Bd 1984). But media interests acquired after the "B" cut-off also will not be charged to an applicant if accompanied by a "contemporaneous" pledge to divest. *See Jerome Thomas Lamprecht*, 99 F.C.C. 1219, 1222 (Review Bd 1984). Recall that MBI, a subsidiary of NEBCO, acquired Station WNCS(FM), Montpelier, VT, in February 1987, a date after the "B" cut-off date in this case. ACI alleges for the first time in its Reply pleading that on March 27, 1987, ACI filed an amendment which disclosed MBI's acquisition of WNCS and that disclosure was accompanied by Silberberg's divestiture statement:

> The divestiture commitment of Mr. Steven A. Silberberg contained in Appledore's [ACI] application which involved the mass media interests of Northeast Broadcasting Company, Inc. extends to its new subsidiary.

(*See* ACI's RPFC at 4-5.) The Presiding Judge has searched the docket filed in this case and finds no amendment of ACI for March 27, 1987. Nor is there any reference to this amendment or divestiture pledge in the *Hearing Designation Order*. Also, the sworn testimony of ACI with respect to media interests states only that MBI is the licensee of WNCS which is subject to the broad divestiture promise in the Form 301 application. (ACI Exh. 2.) There is no reliance placed on ACI's written trial testimony on such disclosure or on any independent divestiture promise in an amendment. In that latter connection, there is no proof to show that a March 27, 1987, amendment was filed within 30 days of MBI's acquisition of WNCS as required under §1.65. *See Lamprecht, supra*. It is concluded that there is insufficient evidence offered to establish by a preponderance of the evidence that Mr. Silberberg made a timely pledge to divest his interest and positions at MBI and WNCS. *See Steadman* v. *S.E.C., supra*. Therefore, under the principles of *Santee Cooper* and *Lamprecht, supra*, ACI, through Silberberg, is attributed MBI's media interest in Station WNCS(FM) at Montpelier, Vermont.

85. Argument was also made that ACI's divestiture of NEBCO's media interests should not be credited because it lacks credibility. But the *Hearing Designation Order* accepted the divestment pledges with respect to WHAV(AM)/WLYT(FM) at Haverhill, MA. (3 F.C.C. Rcd 317 at Para. 7.) The Presiding Judge will not consider a collateral attack on matters established in the designation order. *See Applications For Review of Hearing Designation Orders*, 93 F.C.C. 2d 434 (1983). *See also Ft. Collins Telecasters, et al.*, 103 F.C.C. 2d 978, 983 (Review Bd 1986). It is also found that Silberberg is not so locked into his agreement with NEBCO that his right of alienation of his stock interests have been totally impaired. Further, the Presiding Judge will not consider Colonial's argument that Mr. Silberberg's claim should not be credited because he has had a successful broadcast career. Granted that logical inferences can be drawn from facts in evidence, but only when those inferences are supported by some empirical experience. But there is no data cited to support an inference that prior or existing services in broadcasting negate the good faith of a divestiture pledge. Also, the application for a new FM station at Lisbon, NH is not attributable.

Comparative Diversification Demerits

86. It is necessary to compare the diversification demerits to be assigned between Concepts and ACI. *See Policy Statement, supra*, 1 F.C.C. 2d at 394-95 (extent of ownership interest and location of media outlet will effect the significance of the demerit). Concepts is assigned a slight diversification demerit for the 50% ownership interest of Coleman in station KWAN-AM at Concord, CA, yet Concepts receives a slight diversification preference over ACI. *Compare Richard P. Bott, II*, 4 F.C.C. Rcd _____, Review Bd Slip Op. FCC 89R-32, released June 5, 1989. The demerit assigned to Concepts is slight because of the substantial geographic distance between California and Bedford which detracts from the impact that Coleman's California media interests would have on Bedford radio listeners. *See Focus Television Co.*, 98 F.C.C. 2d 546, 553 (Review Bd 1984). ACI will be assigned a moderate demerit through Mr. Silberberg's derivative interest in Station WNCS(FM) in Montpelier, VT, a community that is only 250 miles distant from Bedford and, therefore, more likely to effect the local community. *Compare Focus Television Co., supra* (Review Board recognized "propinquity decisional significance" of media interests). The net result is an assignment of a slight diversification preference for Concepts over ACI. *See Richard P. Bott, II, supra*.

Integration Proposals

87. Concepts is not entitled to any integration credit because Coleman has been shown to be in control over determining financing needs, site option, determination to exclude Metzler and Dawson as limited partners, and approval of financing and new partners under the partnership agreement which are sufficient as a matter of law to deny integration credit. *See Doylan Forney, et al., supra* at 6330, 6331-32 (no integration allowed when non-voting shareholders played control role in structuring applicant). *See also Utah Television Associates*, 102 F.C.C. 1470, 1478-79 (Review Bd 1985) (integration denied where proposed principals were shown to be "passive," "unfocused" and "unknowledgeable"). Also considered under these holdings was the fact that Coleman and Metzler controlled the finalization and filing of the application Form 301 while the Sheas were vacationing. *See Jarad Broadcasting Co., Inc.*, 1 F.C.C. Rcd 181, 183-84 (Review Bd 1986) (credit reduced for passivity and lack of knowledge about significant aspects of the proposal). In addition, Ms. Patrice Shea's proposal to allot her time among three positions is rejected. *Id. See* Findings at Paras. 47-48, *supra*.

88. The integration proposals of Colonial, MacNeil and ACI are fully credited. Colonial's proposal has been considered in view of Hoover's participation but the law does not prohibit the actions of Hoover on behalf of the applicant. *See Victory Media, supra* at 2074-75. Colonial and MacNeil are awarded substantial credit for long-term continuous residency in Bedford. Colonial, through Gold, receives a substantial credit for broadcast experience, and MacNeil receives a substantial credit for her civic involvement. ACI, through Silberberg, is awarded a moderate to substantial preference for local residency. But his involvement in scouting is discounted since he was involved in that activity because of a commitment to his son's involvement in the program. Similarly, only slight credit is awarded for Silberberg's volunteer activities in the local little league baseball and soccer programs. But ACI, through Silberberg, is entitled to a substantial credit for his past broadcast experience. Also, Silberberg's community social services through his association with Federation and his work on local preservation through Monadnock reflect significant civic activities. However, Ms. MacNeil is the only applicant qualifying for a gender preference and gender preference will prevail over past broadcast experience. *Cannon's Point Broadcasting Co.*, 93 F.C.C. 2d 643 (Review Bd 1983). Since there is no applicant who qualifies for a minority preference, MacNeil is the comparative winner based on integration. *Mid-Florida TV Corp.*, 69 F.C.C. 2d 607, 652 (Review Bd 1978).

Comparative Coverage

89. Consideration also must be given to comparative coverage. *See Hearing Designation Order, supra* at Para. 10. The Commission will award minimal coverage preference to an applicant which proposes greater overall comparative coverage in terms of numbers and percentage. *See*

Cotton Broadcasting Company, 104 F.C.C. 2d 473 (Review Bd 1986) (7.5% difference, 118,000 people). *Cf. Christian Broadcasting of the Midlands, Inc.*, 99 F.C.C. 2d 578, 582-83 (Review Bd 1984). Colonial is entitled to slight preferences over MacNeil (14.6% difference; 38,300 people) and Appledore (14.2% difference; 37,200 people). Concepts is entitled to very slight preferences over MacNeil (8.8% difference; 23,500 people) and Appledore (8.5% difference; 22,400 people). Since there are only twenty nine people who will be provided with a fifth nighttime service, no comparative preference is awarded to Concepts or Appledore for a fifth *de minimus* service. Thus, under the comparative coverage criterion, Colonial is ranked first with a slight comparative preference over MacNeil and Appledore. Concepts, which is ranked second, obtains a very slight comparative preference over Appledore and MacNeil which respectively are ranked third and fourth.

Contingent Comparative Summary

90. Concepts is found to be disqualified under a character issue. Contingently, if found qualified, Concepts would be afforded no integration credit. Even if Concepts' integration were credited, MacNeil would be the comparative winner with Colonial second because of Gold's local residence and broadcast experience and Colonial's slight coverage preference. Concepts contingently places third because of a slightly superior coverage, the gender preference for Patrice Shea, and because of its slight diversification preference over ACI. ACI is ranked last because of its diversification demerit.

ORDER

Accordingly, based on the foregoing, IT IS ORDERED that unless an appeal from this Decision is taken by a party, or unless the Commission reviews this Decision on its own motion,[7] the applications of Colonial Communications, Inc. (File No. BPH-860801MB), Bedford Concepts, A California Limited Partnership (File BPH-860804ME), and Appledore Communications, Inc. (File No. BPH-860804MI) ARE DENIED.

IT IS FURTHER ORDERED that the application of Donna M. MacNeil (File No. BPH-860804MF) for a Construction Permit for a new FM station, Channel 243A at Bedford, New Hampshire IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] The application of Vernon C. Floyd had conflicting coordinates and was rejected in a ruling on reconsideration under the *Hearing Designation Order, supra* at Paras. 2-3. Kirkley Page Beal was dismissed voluntarily on February 29, 1988 (FCC 88M-568). Taylor Broadcasting, Inc. was dismissed voluntarily on March 24, 1988 (FCC 88M-848). Susan R. Beauchamp, Satellite Systems Engineering, Inc., Airwave Communications, Inc., and Bedford Broadcasting Limited Partnership were dismissed on March 25, 1988, for failures to prosecute (FCC 88M-849). Michael J. Hughes was dismissed voluntarily on May 11, 1988 (FCC 88M-1419). Bedford Radio Broadcasting Corp. was dismissed under a settlement on July 6, 1988 (FCC 88M-2135). Benjamin Macwan was dismissed voluntarily on December 1, 1988 (FCC 88M-4137). Interstate Communications was dismissed on December 12, 1988 (FCC 88M-4259).

[2] On November 28, 1986, the Commission released *Clarification On Ownership Attribution*, 1 F.C.C. Rcd 802 (1986).

[3] Mr. Gold owns 99 shares of non-voting stock. Hoover Communications Corporation ("HCC") also owns 99 shares of non-voting stock. Principals of HCC own a 4% non-voting interest in a limited partnership that is the licensee of an AM station in Tucson, AZ. None of HCC principals is an officer or director of Colonial and HCC's interest in the Tucson facility is not attributable to Colonial.

[4] The amendment disclosed that Gold had resigned from his position at Station WFEA and reported that on October 6, 1986, Gold had assumed a sales position with Station WNDS(TV) at Derry, NH, the position from which he proposes to resign if Colonial receives the CP at Bedford. Also, the amendment discloses Hoover's 49% interest in Colonial's application. Hoover also disclosed his position as a party in pending applications for CPs at Marco, FLA and Moultonborough, NH.

[5] The obligation to amend is clear from the Commission's rule. An applicant is responsible for "the continuing accuracy and completeness of information furnished in a pending application." 47 C.F.R. §1.65(a). Whenever the information is no longer "substantially accurate and complete in all significant respects" it must be amended as promptly as possible but no later than 30 days after the event. 47 C.F.R. §1.65(b).

[6] Compare the situation in Colonial's failure to report Coolidge's resignation as assistant secretary. *See* Findings at Para. 35, *supra*. In that situation Colonial had failed to report a reportable event which would not be decisionally controlling. In stark contrast to Colonial's *de minimis* omission, Concepts affirmatively disclosed materially misleading information and knowingly failed to amend. *Cf. Merrimack Valley*, 55 Radio Reg. (2d) P&F at 25 (Commission does not litigate insignificant questions).

[7] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

REUTERS INFORMATION SERVICES, INC. File No. CSG-89-088-AL

Application for Consent for the Assignment of a License to Operate a Fixed Transmit/Receive Earth Station in the International Fixed Satellite Service at Hauppauge, New York

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: July 24, 1989; Released: August 3, 1989

By the Chief, Common Carrier Bureau:

1. The Commission has under consideration the captioned application filed by Reuters Information Services, Inc. (Reuters) for consent to assignment of license to operate a fixed transmit/receive earth station at Hauppauge, New York for the provision of private, non-common carrier services via the INTELSAT system. The application was placed on the Commission's public notice and no comments were received.

APPLICATION

2. Reuters provides news, photo and information services from fourteen data centers linked together by dedicated, private line circuits and three technical centers to more than 3,800 locations. Reuters' technical center at Hauppauge, N.Y. is the site of an international transmit/receive earth station licensed to Equatorial Communication Services (Equatorial), a common carrier, which uses the earth station exclusively to provide INTELNET communications services to Reuters. The earth station facilities consist of a 7.2 meter antenna meeting INTELSAT Standard G-2 technical parameters communicating with an INTELSAT V satellite in the Atlantic Ocean Region in the 4/6 GHz band. The Hauppauge technical center is used for the distribution of news, photo and financial information services to customers of Reuters in Central and South America and the Caribbean basin. Reuters distributes its news pictures and news wire services to media subscribers on one spread spectrum transmission at 9.6 Kbps; and its financial and economic information services to other subscribers on a second spread spectrum transmission at 19.2 Kbps. In the instant application, Reuters seeks Commission approval of the assignment of the license for the international earth station at Hauppauge, New York from Equatorial to Reuters.

DISCUSSION

3. The subject application involves the Commission's authority to license transmit/receive earth stations operating with the INTELSAT system to private, non-common carrier entities. This issue was previously decided by the Commission in acting on a request for a declaratory ruling filed by Reuters. In its request, Reuters sought a determination that the Commission had the authority to license private, non-common carrier earth stations for operation with the INTELSAT system under Title III of the Communications Act, notwithstanding Section 201(c)(7) of the Communications Satellite Act.[1] In a *Declaratory Ruling* released March 15, 1988, the Commission ruled that it did have statutory authority to license transmit/receive earth stations operating with the INTELSAT system to private, non-common entities.[2] The Commission also held that the private international earth station proposed by Reuters was not a "satellite terminal station" within the meaning of either Section 103(2) or 201(c)(7) of the Communications Satellite Act. On May 23, 1989, the Commission's *Declaratory Ruling* was upheld by the United States Court of Appeals for the District of Columbia Circuit.[3]

4. In light of the Commission's *Declaratory Ruling*, as affirmed by the court, we may authorize the assignment of the Hauppauge, New York international earth station license from Equatorial to Reuters pursuant to the public interest standard of Title III of the Communications Act, provided that the station is operated on a non-common carrier basis for private use by the licensee and will not be operationally connected with the terrestrial communications system within the meaning of Sections 103(2) and 201(c)(7) of the Communications Satellite Act. We find that the applicant has demonstrated that the earth station at issue here satisfies these requirements and that a grant of the application is in the public interest.

5. The Hauppauge, New York international earth station is the same earth station that the Commission in its *Declaratory Ruling* determined: (1) was not a "satellite terminal station"; (2) would not be "operationally connected" with a terrestrial communication system; and (3) would not be used to provide common carrier services to the public. Reuters' application provides information which reaffirms this finding. The Hauppauge earth station is dedicated exclusively for Reuters' use. Reuters uses INTELNET communications services to distribute news pictures, news wire services, and financial and economic services to its subscribers at international points. Reuters states that the earth station is not and will not be interconnected with the public switched network; and the circuits established by Reuters are and will be solely outbound point-to-point circuits for international distribution of Reuters services to the premises of its subscribers. Reuters further states that, within the United States, AT&T private line circuits will be used to connect the earth station with its News Bureau offices in the U.S. and with its Washington, D.C. Picture Bureau office. However, in its *Declaratory Ruling*, the Commission found that such use of common carrier private lines does not make Reuters a common carrier or alter the private nature of its satellite transmissions. Thus, we find that Reuters' application complies with the requirements of the *Declaratory Ruling*.

6. We further find that Reuters is otherwise qualified to hold a Commission license under the circumstances presented. Although the applicant is 100% foreign owned

and controlled, alien ownership and control of Reuters does not prohibit the Commission from licensing it to operate the subject earth station on a private, non-common carrier basis. Section 310(b) of the Communications Act, as amended in 1974 by Public Law 93-505, 88 Stat. 1576, only prohibits foreign corporations from holding broadcasting, common carrier, aeronautical enroute, or aeronautical fixed radio licenses. Section 310(b) is applicable only to those licenses specifically enumerated by the language of the provision, and thus is not applicable to private use licensees.[4] Reuters already has been licensed to operate a private, domestic earth station network.[5] The international character of the earth station proposed to be assigned to Reuters does not change this analysis.

7. In view of the foregoing, we find that the public convenience and necessity will be served by approving the above-captioned application for transfer of control of the subject earth station.

8. Accordingly, IT IS ORDERED, that the application of Reuters Information Services, Inc., File No. CSG-89-088-AL, IS GRANTED; and Reuters is authorized to accept assignment of the Hauppauge, New York earth station from Equatorial and operate said station in accordance with all provisions specified in the license for that station.

9. IT IS FURTHER ORDERED that Reuters shall be limited to operating the earth station on a non-common carrier basis for its private use in the international distribution of its services to its subscribers via INTELSAT IBS and INTELNET service offerings.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Section 201(c)(7) provides that the Commission shall:

> "(7) grant appropriate authorization or the construction and operation of each satellite terminal station, either to the corporation or to one or more authorized carriers or to the corporation and one or more such carriers jointly, as will best serve the public interest, convenience, and necessity. In determining the public interest, convenience, and necessity the Commission shall authorize the construction and operation of such stations by communications common carriers or the corporation, without preference to either."

[2] In the Matter of Licensing Under Title III of the Communications Act of 1934, as amended, of Private Transmit/Receive Earth Stations Operating with the INTELSAT Global Communications Satellite System (*Declaratory Ruling*), 3 FCC Rcd 1585 (1988).

[3] TRT Telecommunications Corporation v. Federal Communications Commission, Case Nos. 88-1357, 88-1358, decided May 23, 1989.

[4] *See* Cable Television Citizenship Requirements, 59 FCC 2d 723.

[5] *See* Report No. DS-806, dated December 14, 1988 at p. 6., giving public notice of grant of licenses in File No. 2923-DSE-P/L-88 and File No. 2924-DSE-P/L-88. *See also*, Letter from James R. Keegan, Chief, Domestic Facilities Division, Common Carrier Bureau, to Kenneth E. Hardman, File No. 1302-DSE-P/L-82 (September 23, 1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-101

In the Matter of

Amendment of Section 73.606(b),	RM-5455
Table of Allotments,	RM-5114
TV Broadcast Stations.	
(Anniston, Alabama)	

MEMORANDUM OPINION AND ORDER

Adopted: July 11, 1989; Released: August 3, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by Jacksonville State University ("JSU"), of the decision by *Report and Order*, 52 FR 3677 (1987), which denied a petition for rule making to allot VHF television Channel 4 to Anniston, Alabama, for noncommercial educational use. Oppositions to the petition for reconsideration were filed by Columbus Television, Inc., ("Columbus TV"), licensee of Station WCBI-TV (Channel 4), Columbus, Mississippi, and Gillett Broadcasting of Tennessee, Inc. ("Gillett"), licensee of Station WSMV(TV), Channel 4 at Nashville, Tennessee. JSU filed reply comments.

2. In the *Notice of Proposed Rule Making*, 51 FR 11954, (1986), we proposed the allotment of VHF Channel 4 to Anniston, Alabama, as that community's second local commercial television service. In response to the *Notice*, JSU filed a counterproposal requesting the allotment of VHF Channel 4 to Anniston on a reserved basis. JSU argued that Anniston does not receive adequate noncommercial educational service, only service from Birmingham Station WBIQ-TV via satellite Station WCIQ-TV, Channel *7, Mt. Cheaha, Alabama. JSU further noted that Anniston is served by commercial station WJSU and receives city grade service from two Gadsden, Alabama, stations, WNAL(TV) and WTJP(TV), and receives Grade B service from other area stations. Opposing commenters noted that proposed Channel 4 at Anniston would contravene the requirements of Section 73.685 of the Commission's Rules since it would be impossible to provide any line of sight coverage to the community from the restricted transmitter site area needed to comply with the Commission's minimum distance separation rules.

3. The Commission determined that from the restricted transmitter site, the northern half of Anniston would be shadowed by a major obstruction. The Commission also noted that there is no exemption from Section 73.685 for a noncommercial educational television proposal. Finally, the Commission found that since neither petitioner had demonstrated that there was an acceptable site meeting the primary coverage requirements neither provided a sufficient basis for adoption of the proposed rule.

4. In its petition for reconsideration, JSU contends that the Commission's *Report and Order* did not recognize its commitment to resolve any minimum signal strength deficiencies by the use of translators. JSU further contends that consideration of public interest factors involved in JSU's proposal warrants approval. In noting the public interest benefits, JSU points out that its proposal would 1) provide the region with a local noncommercial educational voice; 2) originate local educational programming directed to the needs and interests of the community; and 3) provide invaluable experience to its students in telecasting. To the extent that the requirements of Section 73.685(b), regarding antenna location are not satisfied, JSU argues that a waiver of the rule is warranted. Finally, JSU states that its request is supported by the unavailability of a non-short spaced alternative site.

5. JSU argues that where: 1) no alternative site is available and 2) a compelling public interest benefit would be achieved by provision of the service proposed by an applicant, translators may be used to provide the minimum signal strength over the community to be served, citing *WSTE - TV, Inc.*, 46 RR 2d 1044 (1979), *Arkansas Educational Television Commission*, 45 RR 2d 432 (1979), and *Pappas Telecasting, Inc.*, 52 RR 2d 1495 (1983).

6. JSU states that although there is no exemption in the rules for a noncommercial educational television proposal, the Commission in waiving Section 73.685(a) has previously recognized the public interest benefits that may attach to educational as opposed to traditional commercial broadcasting in some communities. *Nebraska Educational TV Commission*, 4 RR 2d 771 (1965). In that case, the Commission waived the mandatory minimum signal requirement of Section 73.685(a) in favor of a proposed educational television station to operate at Lexington, Nebraska, where the station was to be part of a state wide educational network.

7. In its opposition, Gillett contends that JSU's reliance on *WSTE-TV, Inc.* and other cases is misplaced since these cases concerned waivers requested at the application stage and not at the allotment stage. Gillett argues that during the allotment phase, a petitioner has the burden of demonstrating that a site is available from which the necessary signal can be provided to the proposed city of license. Gillett notes that petitioner has not met this burden. Gillett also argues that noncommercial educational allotments are no less restricted by the coverage requirements of Section 73.685(a) than unreserved channels, and that the nature of the service to be provided by JSU is irrelevant to the question of whether an adequate showing has been made that the proposal is technically feasible. Gillett states that if the Commission grants JSU's reconsideration request, the proposal should be granted subject to a condition preventing any future relocation of the transmitter site to a point which would be short spaced to any existing station, including Station WSMV, and requiring JSU to install a precise frequency control device.

8. Columbus TV also opposes JSU's petition on the grounds that JSU has offered no evidence that the Commission failed to consider its translator proposal. Columbus TV argues that reconsideration of the Commission's action is therefore not warranted because no new facts or changed circumstances have been presented. Columbus TV further argues that JSU fails to demonstrate that its proposal satisfies the requirements of Section 73.685(b).

Finally, Columbus TV states that notwithstanding the public interest benefits of JSU's proposal, it fails to meet the Commission's minimum technical requirements.

9. In reply comments, JSU reiterates the arguments made in its petition for reconsideration. In addition, JSU contends that the Commission may waive any technical requirement where such a waiver is in the public interest. JSU further contends that there is no absolute requirement that shadow-free service be provided to the entire community, citing *Hatch and Las Cruces, New Mexico*, Mimeo No. 5828, released July 21, 1986; and *San Clemente, California*, 12 FCC Rcd. 2519 (1987).

10. We agree with opposing commenters that JSU has offered no evidence that the Commission failed to adequately consider its proposal to allot VHF television Channel 4 to Anniston. Moreover, JSU's proposal to use translators to compensate for deficiencies in its city grade coverage is insufficient to justify the allotment.

11. JSU argues that translators may be used to provide the minimum signal strength over the community to be served where 1) no alternative site is available and 2) a compelling public interest benefit would be achieved by provision of the service proposed by an applicant, relying on *WSTE-TV, Inc, supra* and other cases. We agree with opposing commenters that JSU's reliance on *WSTE-TV* and other cases to support this position is misplaced. In all of the cases cited, the translator authorizations were granted only after the Commission had authorized the primary stations, not at the allotment stage, as is the situation here.

12. Section 73.685(a) of the Commission's Rules sets forth mandatory provisions for minimum signal strength over the community of license. Commission practice is to deny allotment requests in situations where the requisite principal city coverage cannot be complied with. It would be counterproductive to allot a channel which cannot be utilized to provide an adequate signal. *See, Wadley and Dadeville, Alabama*, 51 FR 24351, July 3, 1986; *New Boston, Ohio*, 48 RR 2d 1628 (1986). Although the Commission will consider waiver requests, consideration of requests to waive the coverage requirement generally have been limited to the application context. Generally it is only at that stage that actual sites can be evaluated. By contrast, in the rule making stage, the Commission generally cannot evaluate the actual transmitter sites that will be specified in the applications. A party requesting waiver at the allotment stage may not turn out to be the successful applicant, and its site may, therefore not be the one ultimately utilized. *Greenwood, North Carolina*, 3 FCC Rcd 4108 (1988). Moreover, here, unlike the *WSTE* case, there is no currently pending translator application, and no guarantee that the application would be filed or granted.

13. JSU also argues that Commission actions in rule making proceeding indicates that there is no absolute requirement that shadow free service be provided to the entire community, citing *San Clemente* and *Hatch and Las Cruces, New Mexico*. In *San Clemente*, although terrain would have resulted in minor shadowing, the Commission found that the requisite city grade signal could be provided to San Clemente. Likewise, in *Hatch and Las Cruces, New Mexico*, where there was also a question of minor shadowing over the community of license, we granted the applicant's request for modification since it was determined that at least one possible site existed from which the required signal strength could be provided to the community. Consequently, while the Commission was flexible regarding its transmitter location requirements, this was not until it was established that it was possible for a signal of sufficient strength to be provided over the community of license.

14. We believe the situation here is more comparable to *Brookville and Versailles, Indiana*, 50 RR 2d 1400 (1982), *Decatur, Texas*, 40 RR 2d 470 (1977), and *Knoxville and Jefferson City, Tenn*, 30 RR 2d 1629 (1974). In each case, the Commission denied proposals that failed to show that they could provide the requisite city grade signal to the community of license. While there may be certain public interest benefits from JSU's proposed use of translators to provide city grade coverage, this proposal is not a viable one since the Commission considers translators as a secondary service. *See* Section 74.702(b) of the Commission's Rules.

15. In the instant case, JSU has not made an initial showing that an acceptable site meeting the primary coverage requirements exists. Based on the foregoing, we find that our earlier decision fully considered JSU's proposal to allot Channel 4 to Anniston and that JSU has not provided any adequate basis for reconsideration of the earlier denial.

16. Accordingly, IT IS ORDERED, That the Petition for Reconsideration, filed by Jacksonville State University IS DENIED.

17. For further information regarding this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

Western States Microwave Transmission Company, Inc. a subsidiary of Communications Transmission, Inc. DFD-89-15

ORDER

Adopted: July 26, 1989; Released: July 28, 1989

By the Chief, Domestic Facilities Division, Common Carrier Bureau:

1. Before the Common Carrier Bureau is a Motion for Extension of Time (Motion) filed by Western Tele-Communications, Inc. (WTCI) on July 21, 1989. WTCI requests an extension of time for filing comments to August 14, 1989. This proceeding was initiated by a Petition for Declaratory Ruling (Petition) filed by Western States Microwave Transmission Company and Communications Transmission, Inc. Public Notice of the Petition was issued on June 29, 1989. Comments were due 30 days later and reply comments 30 days thereafter. In support of its Motion, WTCI states that the Petition raises issues of underlying national telecommunications policy which significantly impact the common carrier industry, and which warrant additional time in which to file meaningful comments. No opposition to the Motion has been received, and Petitioner has indicated that it has no objection.

2. The complexity of the matters that are at issue in this proceeding warrants maximum participation and comment quality. We believe an extension of time of two weeks, as sought by WTCI, will serve this end and the public interest. Therefore, the time to file comments is extended to August 14, 1989, and reply comments to September 13, 1989. No additional extensions are contemplated.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-327

In the Matter of

Amendment of Section 73.202(b), RM-6779
Table of Allotments,
FM Broadcast Stations.
(Longwood, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 20, 1989; Released: August 3, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Great Southern Media (petitioner) requesting the allotment of Channel 235A to Longwood, North Carolina, as its first local service. Channel 235A can be allotted to Longwood in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.3 kilometers (2.7 miles) southwest to avoid a short-spacing to Station WRNS, Channel 236C, Kinston, North Carolina.[1] Petitioner states that it will apply for the channel, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies ". . .among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Longwood is not listed in the U.S. Census.[2] Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Longwood is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1983, *Cascade Village, Colorado*, 48 FR 19917 (1983) and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

3. We believe the public interest would be served by proposing the allotment of Channel 235A to Longwood, North Carolina, since Longwood could receive its first local service, if it is found to be a community for allotment purposes. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Longwood, North Carolina	--	235A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 25, 1989,** and reply comments on or before **October 10, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William J. Pennington, III
Great Southern Media
5519 Rockingham Road-East
Greensboro, North Carolina 27407
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for this allotment are North Latitude 33-58-41 and West Longitude 78-34-36.

[2] We note that Longwood is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 250 people. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi,* 48 FR 5974 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-326

In the Matter of

Amendment of Section 73.202(b),	RM-6765
Table of Allotments,	RM-6782
FM Broadcast Stations.	
(Shallotte, Carolina Beach and	
Kure Beach, North Carolina)	

NOTICE OF PROPOSED RULE MAKING

Adopted: July 20, 1989; Released: August 3, 1989

By the Chief, Allocations Branch:

1. The Commission has before it two mutually exclusive petitions for rule making. Beach Broadcasting of North Carolina, Inc. ("Beach Broadcasting"), licensee of Station WPGO-FM, Shallotte, requests the substitution of Channel 252A for Channel 292A at Shallotte, the modification of its license for Station WPGO-FM accordingly, and the allotment of Channel 292A to Carolina Beach, as the community's first local FM service. Hendrix Broadcasting ("Hendrix") requests the allotment of Channel 294A to Kure Beach, North Carolina, as the community's first local FM service. Both parties state their intention to apply for their requested allotments. These proposals are mutually exclusive since Carolina Beach and Kure Beach are located less than 2 kilometers apart while the Commission's Rules stipulate a minimum distance separation of 27 kilometers between second adjacent Class A allotments.

2. Beach Broadcasting states that Station WPGO-FM and Station WSYN-FM, Channel 293C2 at Georgetown, South Carolina, suffer from mutual interference. Although it recognizes that the two stations are not short-spaced (104.87 kilometers actual vs. 105 kilometers required), Beach Broadcasting contends that this mutual interference is caused by propagation anomalies resulting from the two stations being located near the coast of the Atlantic Ocean. It submits that the situation would be alleviated if one of the stations were to move to another frequency. Further, Beach Broadcasting states that the substitution of channels at Shallotte could enable the community of Carolina Beach to have its first local FM service. It notes that Carolina Beach is an incorporated town in Hanover County, with a 1980 U.S. Census population of 2,000 persons. However, should the Commission decide not to allot the channel to Carolina Beach, Beach Broadcasting still desires the substitution of channels at Shallotte to resolve the interference problem.

3. Hendrix requests the allotment of Channel 294A to Kure Beach as a first local service. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies ". . .among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Kure Beach is not listed in the U.S. Census.[1] Therefore, Hendrix should present the Commission with sufficient information to demonstrate that Kure Beach is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1983, *Cascade Village, Colorado*, 48 FR 19917 (1983) and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

4. We believe the public interest would be served by soliciting comments on the mutually exclusive proposals outlined above. In addition to the need of Hendrix to demonstrate that Kure Beach is a community for allotment purposes, the parties should be guided in their comments by the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), as follows:

(1) first fulltime aural service

(2) second fulltime aural service

(3) first local service

(4) Other public interest matters

[Co-equal weight given to priorities (2) and (3)]

5. Channel 252A can be allotted to Shallotte in compliance with the Commission's minimum distance separation requirements and can be used at the Station WPGO-FM's present transmitter site. Channel 292A can be allotted to Carolina Beach in compliance with the Commission's mileage separation requirements with a site restriction of 8.6 kilometers (5.4 miles) south to avoid a short-spacing to Station WSFL-FM, Channel 293C1, New Bern, North Carolina, or Channel 294A can be allotted to Kure Beach with a site restriction of 2.5 kilometers (1.6 miles) southwest to avoid a short-spacing to Station WSFL at New Bern.[2]

6. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Carolina Beach, North Carolina	--	292A
Shallotte, North Carolina	292A	252A
	OR	
Kure Beach, North Carolina	--	294A
Shallotte, North Carolina	292A	252A

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appen-

dix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **September 25, 1989,** and reply comments on or before **October 10, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jerrold Miller, Esq. Miller & Fields, P.C. P.O. Box 33003 Washington, D.C. 20033 (Counsel to Beach Broadcasting)	Dale Hendrix Hendrix Broadcasting 126 South Jefferson Aurora, Missouri 65605 (Petitioner for Kure Beach)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We note that Kure Beach is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 611 persons. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi,* 48 FR 5974 (1983).

[2] The coordinates for Channel 252A at Shallotte are North Latitude 34-02-50 and West Longitude 78-16-12. The coordinates for Channel 292A at Carolina Beach are North Latitude 33-57-45 and West Longitude 77-55-45. The coordinates for Channel 294A at Kure Beach are North Latitude 33-58-37 and West Longitude 77-55-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-334

In the Matter of

Amendment of Section 73.202(b), RM-6716
Table of Allotments,
FM Broadcast Stations.
(Stuart, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 13, 1989; Released: August 3, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Coon Valley Communications (petitioner), requesting the allotment of Channel 251A to Stuart, Iowa, as the community's first local FM service.[1,2] Petitioner states that it will apply for the channel, if allotted. Channel 251A can be allotted to Stuart in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[3]

2. We believe the public interest would be served by proposing the allotment of Channel 251A to Stuart, Iowa, since an interest has been expressed in providing the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Stuart, Iowa	--	251A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **September 25, 1989**, and reply comments on or before **October 10, 1989**, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Coon Valley Communications
Box 40
Stuart, Iowa 50250
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We note that petitioner's request was signed by its technical consultant, and we are unable from the petition to determine if the consultant is also a principal of the petitioner. Although a petitioner may seek assistance in the preparation of a pleading or petition for rule making, Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission be signed and verified by the commenting or petitioning party and his/her address stated, unless they are represented by legal counsel. Therefore, petitioner is requested to clarify this matter and comply with the requirements of Section 1.52 in submitting its comments. Failure to do so could result in dismissal of its petition.

[2] Petitioner requested the allotment of Channel 258A to Stuart. However, this allotment conflicts with the allotment of Channel 258A at Winterset, as proposed in MM Docket 88-369, 3 FCC Rcd 4650 (1988). Therefore, we have substituted Channel 251A for consideration herein.

[3] The coordinates for this allotment are North Latitude 41-30-18 and West Longitude 94-19-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-335

In the Matter of

Amendment of Section 73.202(b),	RM-6743
Table of Allotments,	
FM Broadcast Stations.	
(Cloquet, Minnesota)	

NOTICE OF PROPOSED RULE MAKING

Adopted: July 11, 1989; Released: August 3, 1989

By the Chief, Allocations Branch:

1. The Commission has before it a petition for rule making filed by WKLK, Inc. (petitioner), requesting the allotment of FM Channel 243A to Cloquet, Minnesota, as that community's second FM broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application for the channel.

2. We believe the proposal warrants consideration. Channel 243A can be allotted to Cloquet, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules at the city reference coordinates.[1] Canadian concurrence will be obtained since Cloquet is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. In view of the fact that the proposed allotment could provide a second FM broadcast service to Cloquet, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Cloquet, Minnesota	263C1	243A, 263C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 25, 1989,** and reply comments on or before **October 10, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John E. Carl
President, WKLK, Inc.
Rt. 2, Box 325B
Kellogg, Iowa 50135

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 243A are 46-43-12 and 92-28-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-336

In the Matter of

Amendment of Section 73.606(b), RM-6800
Table of Allotments,
TV Broadcast Stations.
(Paradise and Chico, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 11, 1989; Released: August 3, 1989

By the Chief, Allocations Branch:

1. The Commission has before it a petition for rule making filed by Sainte Limited ("Sainte"), permittee of Station KBCP(TV), Channel 46, Paradise, California, requesting the amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules at Paradise and Chico, California, to reflect the exchange of Channel 46, Paradise for Channel *30 at Chico, so that Channel 30 can be allotted to Paradise as a commercial channel.[1] Sainte also requests the concurrent modification of its construction permit for KBCP to specify operation on Channel 30.[2]

2. Sainte contends that there are important technical and financial grounds that support the proposed substitution. Sainte notes that although Channel *30 was allotted to Chico in 1971, it has been unoccupied and unapplied for since that time. Sainte contends that as a result of the lower UHF channel position of other commercial UHF stations in the market, operation of KBCP on Channel 46 would place the Paradise station at a competitive disadvantage. Sainte claims that if the requested substitutions are permitted, it would be able to achieve competitive parity with other commercial stations operating on lower UHF channels in the Redding-Chico-Oroville, California, market. Sainte also notes that it has a transmitter which may be used for the proposed Channel 30 operation at Paradise. Sainte contends that if the allotment is not changed, Sainte would be required to spend a minimum of $111,615 to change over its existing transmitter equipment for use on Channel 46. Sainte also argues that its proposal would be in the public interest in view of the fact that if and when there is an interest in bringing a noncommercial station, Channel 46 will be available for such use. Sainte represents to the Commission that it is willing to make a transmitter building and tower available at no charge for use by any party that would be interested in operating Channel *46 at Chico as an educational station. Finally, Sainte argues that the exchange of an unoccupied and unapplied for reserved noncommercial UHF channel with another (albeit higher) reserved UHF is justified because of the many public interest considerations noted above, citing *Jacksonville and Palatka, Florida*, 3 RR 2d 1503 (1964), *Crossville, Tennessee*, 47 RR 2d 1285 (1980), *Seaford, Delaware*, 43 RR 2d 1551 and *Columbus, Mansfield and Newark, Ohio*, 21 FCC 2d 145 (1970).

DISCUSSION

3. Absent special circumstances, the Commission is reluctant to alter noncommercial educational channel allotments by dereserving lower UHF channels and substituting higher UHF channels if the allotment is presently unused and unapplied for. *See e.g. Houston, Texas*, 50 R.R. 2d 1420 (1982) ("Houston"). Although the Commission has substituted a higher UHF reserved channel for an unoccupied lower UHF reserved channel in order to accommodate commercial interests, it will generally do so in order to remedy technical problems and not to enhance a station's economic viability in the marketplace. *See e.g. Crossfield, Tennessee, supra*. However, where a sufficient public interest justification can be shown, UHF channels reserved for noncommercial educational use may be dereserved and allotted for commercial use. *See Lima, Ohio*, 3 FCC Rcd 4621 (1987), and *Seaford, Delaware, supra*.

4. In the instant case and in view of the facts that 1) Channel 30 has been allotted to Chico for 17 years without being occupied or applied for by a noncommercial educational entity, 2) Channel 46 will be available to Chico on a nonreserved basis for any interested parties, and 3) Sainte has expressed its willingness to provide a transmitter building and tower at no charge to an educational licensee on Channel 46, we believe Sainte's proposal warrants consideration. We further believe that the public interest would be served by affording interested parties an opportunity to address the potential public interest benefits accruing from Sainte's proposal.

5. In view of the fact that the proposed allotments would maintain the present levels of commercial and noncommercial service at Paradise and Chico, respectively, while encouraging the introduction of new noncommercial service at Chico, the Commission believes it is appropriate to propose amending the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Paradise, California	46	30
Chico, California	12, *18, 24, *30	12, *18, 24, *46

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **September 25, 1989**, and reply comments on or before **October 10, 1989**, and are advised to read the Appendix for the proper procedures.

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Arthur Scrutchins, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Originally, the instant petition for rule making was returned for *inter alia,* failing to provide sufficient public interest justifications. Sainte then filed a petition for reconsideration of the above action. Since additional information has been submitted regarding the public interest benefits of the proposed substitution, we believe Sainte's proposal warrants consideration.

[2] Sainte proposes to operate KBCP as an independent station, rebroadcasting KCSO(TV), Channel 19, Modesto, California, which airs primarily spanish language programming.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-73

In the Matter of

Amendment of Section 73.202(b), RM-6523
Table of Allotments,
FM Broadcast Stations.
(Linden, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 11, 1989; Released: August 3, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 2529 (1989), issued in response to a petition filed on behalf of Linden Radio Joint Venture (petitioner), permittee, Channel 275A, Linden, Alabama (BPH-860707NE), proposing the substitution of Channel 275C2 for Channel 275A and modification of its construction permit to specify operation on the higher-powered channel. Petitioner filed comments in support of the proposal. No other comments were received.

2. As indicated in the *Notice*, Channel 275C2 can be allotted to Linden, Alabama, consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited in an area at least 23.9 kilometers (14.8 miles) northeast of the community[1] to avoid short-spacing to Station WMSI(FM), Channel 275C, Jackson, Mississippi,[2] as well as to Station WHOD-FM, Channel 276A, Jackson, Alabama.[3] This site also provides protection to Station WMBC-FM, Channel 276C2, Columbus, Mississippi.[4] Moreover, this proposal is contingent upon Station WQIC(FM), Marion, Mississippi, relocating from Channel 276A to Channel 236C2, as directed in MM Docket No. 88-525, 4 FCC Rcd 3720 (1989).

3. In view of the above, we believe the public interest would be served by substituting Channel 275C2 for Channel 275A at Linden, Alabama, since it could provide an additional expanded coverage FM service to the community. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the permit of Linden Radio Joint Venture to specify operation on Channel 275C2 in lieu of Channel 275A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 18, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Linden, Alabama	253C2, 275C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit issued to Linden Radio Joint Venture, Linden, Alabama, IS MODIFIED effective **September 18, 1989,** to specify operation on Channel 275C2 in lieu of Channel 275A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the restricted site for Channel 275C2 at Linden are 32-28-03 and 87-37-48.

[2] Coordinates at the licensed site of Station WMSI(FM), Channel 275C, Jackson, Mississippi, are 32-12-46 and 90-22-54.

[3] Coordinates at the site specified for Station WHOD-FM, Channel 276A, Jackson, Alabama, are 31-32-38 and 87-52-30.

[4] Coordinates at site specified in the construction permit for Station WMBC-FM, Channel 276C2, Columbus, Mississippi, are 33-20-40 and 88-32-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-305

In re Application of

SHIRLEY MARCHANT File No. BPH-870429MD

For Construction Permit
for a New FM Station,
Channel 298A, at
Omega, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: July 21, 1989; Released: August 4, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. In a *Memorandum Opinion and Order*, FCC 89R-41, released June 29, 1989, the Review Board remanded this proceeding to the presiding judge for the adduction of evidence and preparation of an Initial Decision on the following issue:

> To determine whether Shirley Marchant possessed "reasonable assurance" of her proposed transmitter site, in good faith, at the time she filed her application.

On the same date our *Order* was published, Shirley Marchant filed with the Board a Petition for Leave to Amend which seeks to change the applicant's proposed transmitter site. Because this matter has been remanded to the presiding judge, who now has jurisdiction over it, we will refer Marchant's pleading to the presiding officer for consideration consistent with this opinion.[1]

2. Specifically, we wish to make two points explicit with regard to the forthcoming hearing. First, as indicated, we have remanded for a hearing to determine whether Marchant possessed "reasonable assurance" of the transmitter site specified in her application. Unless and until this issue is heard and resolved in Marchant's favor, the presiding officer may not consider Marchant's curative amendment designed to establish that she currently has reasonable assurance of a transmitter site. *See 62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1772 (Rev. Bd. 1989)("It is patent that an applicant must possess a good faith reasonable assurance of the proposed site at the time of filing its application."); *Port Huron Family Radio, Inc.*, 4 FCC Rcd 2532, 2534-2535 (Rev. Bd. 1989), and cases cited therein; *Colorado Television, Inc.*, 98 FCC 2d 513, 515, and 518 n. 6 (Rev. Bd. 1984). ("The chain of good cause has long since been broken . . . ."). Second, assuming that Marchant is successful in establishing that the requisite "reasonable assurance" accompanied her original proposal, any subsequent amendment designed to establish that she now possesses "reasonable assurance" of a new site must, of course, be supported by a showing of "good cause" in accordance with Commission rule and precedent. *See* 47 C.F.R. 73.3522(b); *Genesee Communications, Inc.*, 3 FCC Rcd 3595, 3596 (Rev. Bd. 1988).

3. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend, filed June 29, 1989, by Shirley Marchant IS REFERRED to the presiding Administrative Law Judge in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] The Mass Media Bureau, whose appeal led to the remand in this case, correctly directed its July 11, 1989 comments on Marchant's petition for leave to amend to the presiding officer.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-252

In re Applications of

JOHN JAY ISELIN — File No. BPH-870430NH

CARMINE A. PIZZA, General Partner, CATSKILL FM, LTD. (A Limited Partnership) — File No. BPH-870430NI

For Construction Permit for a New FM Station, Channel 253A, at Catskill, New York

MEMORANDUM OPINION AND ORDER

Adopted: July 25, 1989; Released: August 4, 1989

By the Review Board: BLUMENTHAL and ESBENSEN.

1. In an *Initial Decision*, 4 FCC Rcd 4622 (ALJ 1989) (I.D.), Administrative Law Judge Joseph Stirmer (ALJ) found both captioned applicants fully qualified to be licensees, but determined on a comparative basis that Catskill FM, Ltd. (Catskill) was the preferred applicant.

2. Now before the Board is a "Joint Request for Approval" [of Settlement Agreement] filed by Catskill and John Jay Iselin (Iselin) on July 19, 1989, supplements thereto filed by both parties on July 20, 1989, and July 24, 1989, and a Petition for Leave to Amend filed by Catskill on July 19, 1989. Therein, Catskill proposes to pay Iselin a total consideration of $60,000 in exchange for the dismissal of Iselin's application.[1]

3. Pursuant to Section 73.3525 of the Commission's Rules, 47 C.F.R. §73.3525 (which implements 47 U.S.C. §311(c)), the parties have submitted their proposed Settlement Agreement, as well as appropriate declarations indicating that their respective applications were filed in good faith and not for the purposes of reaching or carrying out a settlement agreement. The parties also properly recite that the proposed Settlement Agreement will be in the public interest; will conserve the resources of the Commission; and will expedite initiation of new FM broadcast service at Catskill, New York.

4. In addition, the proposed Settlement Agreement is conditioned upon grant of Catskill's application, absent a condition that Catskill's principals must divest themselves of their interests in standard broadcast station WCKL (which is licensed to Catskill's limited partner, Catskill Communications, Inc.). Catskill observes that neither the *Hearing Designation Order*, 3 FCC Rcd 3024 (1988) (HDO), nor the *Initial Decision*, *supra*, contained any divestiture requirement; however, Catskill had represented in its application (FCC Form 301), and again in Catskill's Hearing Exhibit No. 1, that it would divest its interest in that facility in the event of grant of the proposed FM station "as a result of a comparative hearing." In any event, we are controlled by *Ruarch Associates*, 103 FCC 2d 1178, 1180-1181 (1986); *see WCVQ, Inc.*, 4 FCC Rcd 4079 (Rev. Bd. 1989); *Breaux Bridge Broadcasters*, FCC 89R-43, released July 10, 1989.[2]

5. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend filed July 19, 1989 by Catskill FM, Ltd., IS ACCEPTED and the amendment IS GRANTED to the extent that Catskill FM, Ltd.'s limited partner, Catskill Communications, Inc., (or its principals) need not divest itself of any interest in, or connection with, standard broadcast station WCKL; and,

6. IT IS FURTHER ORDERED, That the Joint Request for Approval [of Settlement Agreement] filed July 19, 1989 (as supplemented July 20, 1989, and July 24, 1989) by Catskill FM, Ltd., and John Jay Iselin IS GRANTED; that the settlement agreement IS APPROVED; that the application of John Jay Iselin (File No. BPH-870430NH) IS DISMISSED; and that the application of Catskill FM, Ltd. (File No. BPH-870430NI) IS GRANTED with the following condition:

> Before PROGRAM TEST AUTHORITY is authorized by the Commission, a fence must be erected at such distances and in such a manner as to prevent the exposure of humans to radio frequency radiation in excess of the American National Standards Institute guidelines (OST Bulletin No. 65, October 1985). The fence must be of a type which will preclude casual or inadvertent access, and must include warning signs at appropriate intervals which describe the nature of the hazard. Permittee shall submit documentation of compliance with this special operating condition along with the form 302, application for license, and the request for PROGRAM TEST AUTHORITY.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] One-half the total consideration ($30,000) shall be paid upon approval of the settlement agreement, and the remaining sum ($30,000) shall be due one year thereafter.

[2] In *WCVQ, Inc.*, and *Breaux Bridge*, *supra*, the Board indicated that *Ruarch* was unpublished and rendered pursuant to delegated authority. These statements were incorrect.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-507

In the Matter of

Amendment of the Maritime Services Rules (Part 80) to restrict the frequency selection capability of VHF transmitters to maritime frequencies.

ERRATUM

Released: August 3, 1989

1. On July 13, 1989, the Commission released a *Report and Order,* in the above captioned proceeding, FCC 89-230. Paragraph 20 of that document incorrectly indicated that the effective date of the *Report and Order* would be **August 1, 1989.** This error is corrected by changing the effective date to **September 7, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 3, 1989

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PUERTO RICO TELEPHONE COMPANY'S PETITION FOR DECLARATORY RULING OR, IN THE ALTERNATIVE, WAIVER

On July 14, 1989, the Puerto Rico Telephone Company (PRTC) filed a petition for declaratory ruling concerning its equal access obligations or, in the alternative, waiver of these requirements. Specifically, PRTC requests a ruling that the requirement that it implement Feature Group D (FGD) equal access by the end of 1989 is no longer applicable because PRTC has withdrawn all of its applications to provide off-island message telecommunications service. If the Commission does not grant the declaratory ruling, PRTC requests a waiver of the equal access conversion deadline of December 31, 1989.

In CC Docket No. 86-309 (Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service Off of the Island of Puerto Rico, 2 FCC Rcd 6600 (1987)), the Commission relied on PRTC's representation that it would implement equal access throughout its service territory by the end of 1989, and made this a condition of PRTC's entry into the off-island telecommunications markets. However, the Commission stated that it would wave this requirement if PRTC could not reasonably complete its equal access conversion in this time frame.

PRTC subsequently substituted Telefonica Larga Distancia de Puerto Rico (TLD) as the applicant for authority to provide Puerto Rico off-island telecommunications service (PRTC and TLD are subsidiaries of the Puerto Rico Telephone Authority (PRTA), a public corporation of Puerto Rico). On September 14, 1988, the Common Carrier Bureau authorized TLD to provide off-island telecommunications service, subject to PRTC's compliance with the requirements of the *Puerto Rico Order*.

PRTC notes in its petition that it has experienced delays in modernization and reconfiguration of its network required for implementation of FGD equal access. PRTC states that these delays in turn required that it defer the notice and presubscription balloting phase of equal access conversion. PRTC emphasizes, however, that it is committed to equal access conversion and provides a schedule for the implementation of FGD equal access no later than the end of the third quarter of 1990. Specifically, PRTC requests approval to: (1) notify interexchange carriers during the first quarter of 1990 of equal access conversion and ordering plans; (2) require interexchange carriers to order FGD equal access 60 days after they are notified; (3) distribute the first FGD presubscription ballots for all end offices 90 days after notification of equal access conversion plans and ordering requirements; (4) distribute the second presubscription ballots 50 days after initial ballots; and (5) convert all end offices to FGD equal access (starting 180 days after interexchange carriers are notified of PRTC's plans and ordering requirements) at approximately the same time during the third quarter of 1990.

Interested parties may file comments on the PRTC petition by **September 6, 1989,** and reply comments by **September 21, 1989.** Comments and reply comments should be filed with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy of all comments and reply comments should also be sent to Rose Crellin, FCC, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public records duplication, International Transcription Services (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS by calling (202) 857-3800.

For further information contact Rose Crellin, Policy and Program Planning Division, Common Carrier Bureau, at (202) 632-9342.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-493

In the Matter of

Amendment of Section 73.202(b), RM-5912
Table of Allotments,
FM Broadcast Stations.
(Columbia and Fulton, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 30, 1989; Released: August 4, 1989

By the Chief, Allocations Branch:

1. Before the Commission is a *Notice of Proposed Rule Making and Order to Show Cause* ("Notice")[1] issued in response to a petition filed by Contemporary Broadcasting, Inc. ("Contemporary"). Contemporary proposes the substitution of Channel 252C2 for Channel 252A at Columbia, Missouri, and modification of its license for Station KFMZ(FM) to specify operation on the higher class channel. This proposal would require substitution of Channel 263A for Channel 249A at Fulton, Missouri, and modification of the license of Station KKCA, Fulton, accordingly.

2. The *Notice* tentatively concluded that the public interest would be served by allotting Channel 252C2 to Columbia because it would provide a wide coverage area service. We identified several prerequisites to adoption of Contemporary's proposal. First, as indicated above, Channel 263A must be substituted for Channel 249A at Fulton and the license of Station KKCA, Fulton, modified accordingly. Further, the substitution at Fulton could be accomplished only by imposing a site restriction of 18.3 kilometers southwest on a proposal in MM Docket No. 87-294 seeking allotment of Channel 261C2 to Jefferson City, Missouri.[2] Moreover, the allotment of Contemporary requests is also contingent on the proceeding in MM Docket No. 86-146 at Palmyra, Missouri,[3] and resolution of a proceeding involving an application by Station KYKY, Channel 251C, St. Louis, Missouri, to relocate its transmitter site. We now consider the comments and replies filed by the licensees affected by this proposal.

3. KFAL filed comments opposing the substitution at Fulton and submitted a counterproposal that would substitute Channel 227A for Channel 249A at Fulton and modify the license of KKCA accordingly. KFAL maintains that Channel 227A can be allotted to Fulton in light of a lack of interest in that channel in the Steelville, Missouri, proceeding.[4] Thus, KFAL concludes, the Commission may terminate that proceeding and release Channel 227A for consideration in the instant proceeding. Moreover, KFAL asserts, allotment of Channel 227A to Fulton would not adversely affect Contemporary's proposed upgrade and would permit a future upgrade of KKCA.

4. Triple D Properties, Inc. ("Triple D"), licensee of KJMO(FM), Jefferson City, Missouri, filed comments opposing the substitution at Fulton and submitted a counterproposal. However, Triple D subsequently withdrew its comments and counterproposal. Therefore, we will not engage in any further analysis of its comments or other parties' replies to Triple D's proposal.

5. EZ Communications, Inc. ("EZ"), licensee of Station KYKY(FM), St. Louis, Missouri, opposes Contemporary's proposal because it would require denial of KYKY's application to relocate its transmitter site. Therefore, EZ requests that the Commission dismiss or deny the proposal if it forecloses relocation of KYKY's transmitter.

6. Contemporary filed comments restating its interest in Channel 252C2 at Columbia and reiterating its intent to reimburse KFAL for the reasonable costs incurred in the requisite modification of KKCA. Contemporary also filed a reply to the counterproposal of KFAL and the comments of EZ.[5] Regarding KFAL's counterproposal, Contemporary maintains that KFAL was mistaken in its assertion that Channel 227A is available at Fulton because in the Steelville proceeding no expressions of interest were filed. To the contrary, Contemporary demonstrates that there was a restatement of interest filed by the petitioner which invalidates KFAL's assertion that the Steelville rule making may be closed out and Channel 227 allotted to Fulton.

7. Finally, Contemporary filed Supplemental Comments and Request for Expedited Action after the comment and reply period had closed.[6] These comments assert that all impediments to the Commission's adoption of the proposal set forth in the *Notice* have either been withdrawn or are now moot as a result of recent events. In this regard, Contemporary states the following: 1) Triple D has withdrawn its comments and counterproposal; 2) EZ filed a minor amendment to its pending full class C application[7] which converted it into a C1 proposal, thus eliminating EZ's objections and the need to deny its application before adopting Contemporary's proposal; 3) KFAL, which objects only to the Fulton substitution, has had its counterproposal rendered moot by allotment of its proposed Channel in the Steelville proceeding;[8] and 4) the Commission substituted Channel 250C2 for 252A at Palmyra, Missouri.[9] Contemporary states that the only barrier to finality of that decision is its Contingent Petition for Reconsideration, the basis for which is its belief that the Commission could not allot Channel 250C2 to Palmyra without first resolving Contemporary's pending Petition for Reconsideration concerning its efforts to have that channel alloted to Columbia.[10] Contemporary concedes that allotment of Channel 252C2 to Columbia would vitiate its Channel 250C2 proposal and the petitions based on that proposal. Thus, Contemporary offers to dismiss its Palmyra and Columbia reconsideration petitions if the Commission grants its proposal here, removing any barrier to completion of this proceeding and the Palmyra Rule Making.

DISCUSSION

8. After careful consideration of the record in this proceeding, and events occurring subsequent to the close of the record, we believe it would be in the public interest to grant the proposal advanced by Contemporary. Because Triple D withdrew its counterproposal, our only option to the proposal set forth in the *Notice* was the

counterproposal filed by KFAL. It proposed allocation of Channel 227A to Fulton, in lieu of Channel 263A, relying on its conclusion that in the Steelville proceeding no party filed an expression of interest in Channel 227A. However, KFAL was incorrect in this regard. In fact, the petitioner in Steelville filed a letter restating his interest in applying for that channel and it was subsequently alloted to Steelville, thus, excluding it from consideration here.[11] In the absence of any viable counter-proposals here, we are left with the original proposal set forth in the *Notice*. However, there are several contigencies upon which adoption of that proposal was conditioned.

9. Foremost among the prerequisites to allotment of Channel 252C2 to Columbia was the substitution of Channel 263A for Channel 249A at Fulton and the modification of KKCA's license to specify operation on Channel 263A. In turn, this required a site restriction in MM Docket 87-294. This site restriction has been ordered since the *Notice* was adopted.[12] Thus, Channel 263A may be substituted for Channel 249A and the license of KKCA will be modified to reflect this change.

10. The *Notice* also stated that, to remain in accord with the Commission's minimum mileage separation requirements, grant of Contemporary's proposal was contingent on denial of Station KYKY's application to relocate its transmitter site. This is no longer the case. After the record closed in this proceeding, EZ filed an amendment to its pending Class C application,[13] which downgraded that application to Class C1. EZ's amendment permits us to allot Channel 252C2 to Columbia without running afoul of our separation requirements.

11. The only remaining obstacle to allotment of Channel 252C2 to Columbia is resolution of Contemporary's Petition for Reconsideration of the Palymra proceeding which is contingent on a Petition for Reconsideration filed by Contemporary in an earlier Columbia proceeding. In a prior *Report and Order* the Commission substituted Channel 250C2 for Channel 252A at Palmyra.[14] Contemporary filed petitions for reconsideration in both the Columbia and Palmyra proceedings based on its efforts to have Channel 250C2 alloted to Columbia. Columbia, however, is correct in its observation that adopting its proposal here obviates the need to address the issues raised in these petitions. We have, therefore, by separate orders granted Contemporary's request to dismiss those petitions in view of our decision herein.[15]

12. We believe that the public interest will be served by adoption of Contemporary's proposal. Because all the contingencies set forth in our *Notice* have been resolved, we conclude that Channel 252C2 can be alloted to Columbia, Missouri, providing that community with a wide coverage area service. The license of Station KFMZ(FM) is modified to specify operation on the new channel. To accomplish this upgrade, Channel 263A is substituted for Channel 249A at Fulton, Missouri, and the license of Station KKCA is modified accordingly.

13. Accordingly, pursuant to Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204 and 0.286 of the Commissions Rules, IT IS ORDERED, That effective **September 18, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below to read as follows:

City	Channel No.
Columbia, Missouri	230, 244A, 252C2, 269A
Fulton, Missouri	263A

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Contemporary Broadcasting, Inc., for Station KFMZ(FM), Channel 252A, Columbia, Missouri, IS MODIFIED to specify operation on Channel 252C2, effective **September 18, 1989,** subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of KFAL, Inc., for Station KKCA, Channel 249A Fulton, Missouri, IS MODIFIED to specify operation on Channel 263A, effective **September 18, 1989,** subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License No. BLH4922 except the channel as specified above. Any other changes, except for those specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License No. BLH4922 except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information, contact Douglas Minster, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Mass Media Bureau

FOOTNOTES

[1] 2 FCC Rcd. 6959 (1987).

[2] *See, Notice of Proposed Rule Making, Jefferson City and Vandalia, Missouri*, 2 FCC Rcd 4741 (1987).

[3] *Report and Order, Palmyra, Missouri and Pittsfield, Illinois*, 2 FCC Rcd 5236 (1987). Although Channel 250C2 has been alloted to Palmyra, a construction permit has not issued because Contemporary has filed a petition for reconsideration of that action. This matter is addressed *infra*.

[4] *See Notice of Proposed Rule Making, Steelville and Hermann, Missouri*, MM Docket No. 87-335, 2 FCC Rcd 5634 (1987).

[5] Because of intervening events, discussed *infa*, which have rendered EZ's comments and reply moot, we will not discuss Contemporary's reply to those comments.

[6] Contemporary brings to our attention events which have ocurred since the close of the record and bear directly on the outcome of this proceeding. Thus, we conclude that Contemporary has demonstrated good cause for considering these facts herein.

[7] File No. BPH-870227PG.

[8] *See Report and Order, Steelville and Hermann, Missouri*, MM Docket No. 87-335, 3 FCC Rcd 3073 (1988).

[9] *Report and Order, Palmyra, Missouri and Pittsfield, Illinois*, 2 FCC Rcd 5236 (1987).

[10] Contemporary first sought reconsideration of the Commission's May 12, 1986, return of its petition for Rule Making which proposed to substitute Channel 250C2 for Channel 252A at Columbia. In its contingent petition for reconsideration filed in the Palmyra proceeding, Contemporary argues that its earlier petition must be addressed before Channel 250C2 can be allotted to Palmyra.

[11] *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Steelville and Hermann, Missouri)*, Report and Order in MM Docket No. 87-335, 3 FCC Rcd 3073 (1988).

[12] *See Report and Order in MM Docket 87-294*, adopted May 3, 1989.

[13] File No. BPH-870227PG.

[14] *See Report and Order in MM Docket No. 86-146, 2* FCC Rcd 5236 (1987).

[15] Our action dismissing these petitions removes the remaining impediment to the issuance of a construction permit to Palmyra Broadcasting Company, licensee of Station KIDS, Palmyra, thus, finalizing Docket No. 86-146.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-332

In the Matter of

Amendment of Section 73.202(b), RM-6720
Table of Allotments,
FM Broadcast Stations.
(Defuniak Springs, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 20, 1989; Released: August 4, 1989

By the Chief, Allocations Branch:

1. At the request of Defuniak Communications, Inc. (petitioner), licensee of Station WQUH(FM), Channel 276A, Defuniak Springs, Florida, the Commission has before it a petition for rule making seeking the substitution of Channel 276C2 for Channel 276A and modification of its license for Station WQUH(FM) to specify operation on the higher class co-channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 276C2 can be allotted to Defuniak Springs in compliance with the Commission's minimum spacing requirements with a site restriction 8.2 kilometers (5.1 miles) west of the city.[1] The site restriction is necessary in order to avoid short spacings to Station WTHZ(FM), Channel 276A, Tallahassee, Florida, and a construction permit for Station WSYA(FM), Channel 277C, Montgomery, Alabama.

3. As requested, we shall propose to modify the license of Station WQUH(FM) to specify operation on Channel 276C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Defuniak Springs.

4. In view of the fact that Defuniak Springs, Florida, could receive its first wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Defuniak Springs, Florida	276A	276C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 25, 1989,** and reply comments on or before **October 10, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows: Defuniak Communications, Inc., P. O. Box 986, Brentwood, TN 37027-0986.

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will

be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are 30-42-27 and 86-11-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-331

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Bartonville, Illinois)	RM-6737

NOTICE OF PROPOSED RULE MAKING

Adopted: July 20, 1989; Released: August 4, 1989

By the Chief, Allocations Branch:

1. The Commission has before it a petition for rule making filed by Willis Jordan (petitioner), proposing the allotment of FM Channel 251A to Bartonville, Illinois, as that community's first local service. Petitioner stated his intention to apply for the channel, if allotted.

2. Petitioner states that Bartonville is located in Peoria County, Illinois, and is listed in the 1980 U.S. Census as having a population of 6,110.

3. Channel 251A conflicts with a pending proposal in RM-6632 at Princeton, Illinois. Therefore, in an effort to accommodate petitioner's proposal, we sought an alternate channel and have determined that Channel 260A can be allotted to Bartonville. Channel 260A can be allotted to Bartonville in compliance with the minimum distance separation requirements of Section 73.207(b) with a site restriction 2.7 kilometers (1.7 miles) northwest to avoid short-spacing to Station WESZ(FM), Channel 261A at Lincoln, Illinois.[1]

4. In view of the fact that Bartonville could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Bartonville, Illinois	--	260A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 25, 1989,** and reply comments on or before **October 10, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Harry C. Martin
Reddy, Begley & Martin
2033 M Street, N.W.
Washington, D.C. 20036
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this proposal are 40-40-28 and 89-40-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-330

In the Matter of

Amendment of Section 73.202(b), RM-6722
Table of Allotments,
FM Broadcast Stations.
(Altoona, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 19, 1989; Released: August 4, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Margaret Keefer (petitioner), seeking the allotment of Channel 251A to Altoona, Wisconsin, as that community's first local FM service. Petitioner states an intention to apply for the channel, if allotted. Channel 251A can be allotted to Altoona in compliance with the Commission's minimum distance separation requirements.[1]

2. In view of the fact that Altoona could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Altoona, Wisconsin	—	251A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **September 25, 1989,** and reply comments on or before **October 10, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Margaret Keefer
811 Duke
Rice Lake, WI 54868
(Petitioner)

Larry G. Fuss, Consultant
Contemporary Communications
P.O. Box 4010
Opelika, AL 36803
(Consultant to petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The reference coordinates are 44-48-26 and 91-26-49.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-329

In the Matter of

Amendment of Section 73.202(b),	RM-6781
Table of Allotments,	
FM Broadcast Stations.	
(Atlantic, North Carolina)	

NOTICE OF PROPOSED RULE MAKING

Adopted: July 20, 1989; Released: August 4, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Great Southern Media ("Great Southern") requesting the allotment of Channel 297A to Atlantic, North Carolina, as its first local FM service. Channel 297A can be allotted to Atlantic in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Petitioner states that it will apply for the channel, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies " : . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Atlantic is not listed in the U.S. Census. Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Atlantic is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1983, *Cascade Village, Colorado*, 48 FR 19917 (1983) and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.[2]

3. We believe the public interest would be served by proposing the allotment of Channel 297A to Atlantic, North Carolina, as its first local service, contingent upon a finding that Atlantic is a community for allotment purposes. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the place listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Atlantic, North Carolina	--	297A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 28, 1989,** and reply comments on or before **October 13, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William J. Pennington, III
5519 Rockingham Road - East
Greensboro, North Carolina 27407
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for this allotment are North Latitude 34-53-30 and West Longitude 76-20-24.

[2] We note that Atlantic is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 900 persons. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi,* 48 FR 5974 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-328

In the Matter of

Amendment of Section 73.202(b), RM-6777
Table of Allotments,
FM Broadcast Stations.
(Belvidere, New Jersey and Scranton,
Pennsylvania)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: July 20, 1989; Released: August 4, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by WRNJ-Daytimer (petitioner), requesting the allotment of Channel 296A to Belvidere, New Jersey, as the comunity's first local FM service. In addition, petitioner requests that the license of Station WEZX at Scranton, Pennsylvania, be modified to specify Channel 295A in lieu of its present Channel 296A. Petitioner states that it will apply for Channel 296A, if allotted to Belvidere, and if it receives the construction permit, it will reimburse Station WEZX for the reasonable costs associated with its change of channel.

2. Channel 296A can be allotted to Belvidere in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.3 kilometers (2.1 miles) north to avoid a short-spacing to Station WKDN, Channel 295B, Camden, New Jersey, and to Station WBYO, Channel 298B, Boyertown, New Jersey. Channel 295A can be allotted to Scranton in compliance with the Commission's minimum distance separation requirements and can be used at the present transmitter site of Station WEZX.[1] Canadian concurrence for the Scranton allotment is required since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 296A to Belvidere, New Jersey, and the substitution of Channel 295A for Channel 296A at Scranton, since it could provide Belvidere with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Belvidere, New Jersey	--	296A
Scranton, Pennsylvania	258A, 267B, 285A, 296A	258A, 267B, 285A, 295A

4. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, The Scranton Times, licensee of Station WEZX, Scranton, Pennsylvania, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 295A as proposed herein instead of the present Channel 296A.

5. Pursuant to Section 1.87 of the Commission's Rules, The Scranton Times may, not later than **September 25, 1989,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on The Scranton Times to furnish additional information. If The Scranton Times raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date refered to above, The Scranton Times will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

6. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensee of Station WEZX, as follows: The Scranton Times, 149 Penn Avenue, Scranton, Pennsylvania 18503.

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **September 25, 1989,** and reply comments on or before **October 10, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lawrence Roberts, Esq.
Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons and Topel, P.C.
1000 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20036
(Counsel to petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commis-

sion's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

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5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 296A at Belvidere are North Latitude 40-51-17 and West Longitude 75-04-50. The coordinates for Channel 295A at Scranton are North Latitude 41-25-41 and West Longitude 75-44-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 84-1234

In the Matter of

Amendment of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Mobile Satellite Service for the Provision of Various Common Carrier Services	RM-4247

MEMORANDUM OPINION AND ORDER

Adopted: May 31, 1989; Released: August 4, 1989

By the Commission:

INTRODUCTION

1. By this action the Commission denies a Petition for Reconsideration filed jointly by seven "Aviation Parties", requesting further reconsideration of the *Memorandum Opinion and Order* (*Reconsideration Order*) [1] in General Docket No. 84-1234.[2] In general, the Aviation Parties urge the Commission to conform the United States domestic frequency allocations at L-band for aeronautical mobile-satellite (R) service (AMSS(R)) and the mobile-satellite service (MSS)[3] to those adopted at the 1987 Mobile WARC.[4] The Commission finds that the domestic allocations adopted in the *Report and Order* in this proceeding provide for more efficient use of the spectrum and more availability of spectrum for aeronautical safety during peak demand conditions than the new international allocations.[5] In light of these and other factors discussed below, the Commission affirms the L-band allocations made in earlier stages of this proceeding. The petition for further reconsideration filed by the Aviation Parties is denied.

BACKGROUND

2. On July 24, 1986, the Commission adopted a *Report and Order* in this proceeding, allocating 27 MHz in the L-band for the mobile-satellite service (MSS) to be shared with the aeronautical mobile-satellite (R) service (AMSS(R)).[6] An additional 1 MHz of spectrum was left available exclusively for AMSS(R). Thus, the Commission allocated 28 MHz of spectrum at L-band as follows:

- Two 4.5 MHz band segments for AMSS(R) on a primary basis (*i.e.*, 1545.0-1549.5/1646.5-1651.0 MHz) with MSS permitted on a secondary basis.

- Two 9 MHz segments for co-primary shared use by AMSS(R) and MSS (1549.5-1558.5/1651.0-1660.0 MHz) with a footnote indicating that AMSS(R) will have priority access over MSS use.[7]

- The two 0.5 MHz segments at 1558.5-1559.0 MHz/1660.0-1660.5 MHz available for AMSS(R) on a primary basis were left unchanged.

The Commission found that the sharing arrangement reflected in these allocations would strike a proper balance between AMSS(R) and MSS requirements, and encourage rapid and economical development of both services. Subsequently, a *Second Report and Order* established general policies for the licensing of a consortium to implement the mobile-satellite service.[8]

3. Eight petitions for reconsideration of the *Report and Order* were filed concerning the L-band allocation to AMSS(R) and MSS. In response the Commission affirmed its allocation and denied the petitions for reconsideration in the *Reconsideration Order*.[9] The Aviation Parties argued against the L-band allocation, claiming that the entire band was required for AMSS(R). However, the Commission rejected this argument. The Aviation Parties submitted a study by Aeronautical Radio, Inc. (Arinc) that showed that the entire band would not be required by AMSS(R) except under rare peak conditions (*i.e.*, where aircraft traffic is at a peak and weather conditions are poor over widespread areas). The Commission noted that the spectrum requirement for AMSS(R) under normal conditions is about 6 MHz according to the Arinc study. Thus, the Commission's allocation of 10 MHz on a primary basis for AMSS(R) was expected to be adequate most of the time. Moreover, in those rare circumstances where more capacity is required, AMSS(R) would have access to the entire 28 MHz of L-band spectrum. The Commission stated that it expected such situations to occur very seldom and under normal circumstances much of the spectrum would be available for non-AMSS(R) service.

4. In the *Reconsideration Order*, the Commission also noted the Aviation Parties suggestion that aircraft public correspondence (APC) or various administrative communications could be provided on a secondary basis in AMSS(R) spectrum. It appeared these alternative services would occupy much or most of the L-band spectrum allocated to AMSS(R) under normal circumstances. The Commission stated that AMSS(R) communications were limited under the international *Radio Regulations* (then in effect) to aeronautical communications of enroute flights related to safety and regularity of flight. The Commission stated that passenger communications services, and possibly certain administrative communication services, may not be provided under an AMSS(R) allocation. Under the Commission's L-band allocation, these additional services could be provided only within the MSS. The Commission rejected the suggestion by the Aviation Parties that all types of communications to aircraft might be included on an AMSS(R) system.

5. In response to concerns raised by the Aviation Parties and the MSS coalition, the *Reconsideration Order* also made minor revisions to Footnote US308 for clarification.[10] Specifically, the revised footnote clarified that the priority access for AMSS(R) must be in real-time (*i.e.*, immediate). Two new sentences were also added: systems not interoperable with the aeronautical mobile-satellite

(R) service shall operate on a secondary basis; and, account shall be taken of the priority of safety-related communications in the mobile-satellite service.[11]

6. Subsequently, a World Administrative Radio Conference on Mobile Services (1987 Mobile WARC) was held in September-October 1987 to discuss the existing international mobile allocations. At the 1987 Mobile WARC, the U.S. advocated a generic mobile-satellite service at L-band using the spectrum currently allocated separately to the maritime mobile-satellite service and to the aeronautical mobile-satellite (R) service. The maritime mobile-satellite service (MMSS) is allocated spectrum adjacent to the aeronautical mobile satellite service at L-band. Specifically, MMSS is allocated at 1530-1544 MHz and 1626.5-1645.5 MHz. Under the U.S. proposals, aeronautical, maritime, and land mobile-satellite services were all to be grouped together and share spectrum on an equal footing. However, safety services were to be given priority throughout the band. The 1987 Mobile WARC chose not to adopt such an approach. Rather, the 1987 Mobile WARC decided to study the U.S. proposal further by establishing new study questions for the CCIR.[12]

7. The 1987 Mobile WARC adopted the following international allocation scheme for the land mobile-satellite service (LMSS): 8 MHz (1555-1559/1656.5-1660.5 MHz) on an exclusive basis (the spectrum was taken from spectrum previously allocated for AMSS(R)); 6 MHz (1530-1533/1631.5-1634.5 MHz) on a co-primary basis to LMSS and the maritime mobile-satellite service (MMSS); and 27 MHz (1533-1544/1626.5-1631.5/1634.5-1645.5) of secondary spectrum for LMSS non-speech, low bit-rate data in which MMSS has primary status. As a result of this action, the international AMSS(R) allocation was reduced to 20 MHz. The 20 MHz allocated to AMSS(R) by the 1987 Mobile WARC is exclusively for aeronautical services. Prior to the 1987 Mobile WARC the AMSS(R) international allocation consisted of 28 MHz (1545-1559/1646.5-1660.5 MHz).[13] Also, the 1987 Mobile WARC added Footnote 729A which states: "Notwithstanding any other provisions of the *Radio Regulations* relating to restrictions in the use of the bands allocated to the aeronautical mobile-satellite (R) service for public correspondence, the bands 1545-1555 MHz and 1646.5-1656.5 MHz may be authorized by administrations for public correspondence with aircraft earth stations. Such communications must cease immediately, if necessary, to permit transmission of messages with priority 1 to 6 in Article 51." The U.S. took the following reservation to the decisions taken at the Mobile WARC:

> The Delegation of the United States of America formally declares that the USA does not, by signature of those Final Acts on its behalf, accept certain decisions taken by this Conference in regard to the Table of Frequency Allocations and the associated footnotes, and therefore, the USA:
>
> in view of the fact that the Conference has unduly restricted allocations for mobile-satellite services in the bands 1530-1559 MHz and 1626.5-1660.5 MHz, states its intention to utilize these bands in the way most appropriate to satisfy its particular mobile-satellite services requirements recognizing the priority of AMSS(R) and maritime safety communications.[14]

8. The Aviation Parties filed a Petition for Further Reconsideration in this proceeding generally requesting the Commission to conform its domestic U.S. allocations at L-band to those adopted at the 1987 Mobile WARC, including the footnote provision adopted at the 1987 Mobile WARC permitting APC at L-band. An opposition to the petition was filed by the American Mobile Satellite Corporation (AMSC) and comments were submitted by GTE Airfone Incorporated.[15] The Aviation Parties filed a reply to the opposition. Letters were also received from the National Transportation Safety Board (NTSB) stating its interest in ensuring the needs of aeronautical safety. These NTSB letters and the Commission's responses have been placed in the Docket file for this proceeding. The issues raised in these pleadings regarding aeronautical safety communications have been thoroughly considered by the Commission in this proceeding.

DISCUSSION

Need to conform to 1987 Mobile WARC

9. In their petition, the Aviation Parties initially argue that the Commission should conform the domestic allocation for MSS and AMSS(R) to the international allocation adopted at the 1987 Mobile WARC. The Aviation Parties offer two legal arguments in support of this position. First, the petitioners argue that the U.S. reservation to the 1987 Mobile WARC did "not provide the legal or policy justification necessary to implement the Commission's domestic allocation."[16] More particularly, the Aviation Parties claim that the legal effect of the U.S. refusal to support an amendment to an existing treaty is to maintain the effectiveness of the earlier, ratified version of the treaty. In this case, the earlier version would be the 1979 World Administrative Radio Conference (79 WARC). As the 1979 WARC only provides for AMSS(R) in the L-band, the Aviation Parties contend that the reservation can only be read to retain for the U.S. the right to use the 28 MHz at issue exclusively for AMSS(R).

10. Second, the Aviation Parties assert that in the event the Commission chooses not to comply with the 1979 WARC but instead to establish a non-conforming domestic allocation pursuant to international *Radio Regulation* 342,[17] the international *Radio Regulations* require that the non-conforming allocation not cause harmful interference to facilities operating in accordance with the international *Radio Regulations*. The Aviation Parties contend that the Commission's generic allocation will cause interference to conforming international AMSS(R) systems. Further, the Aviation Parties maintain that the U.S. MSS system will receive extensive interference from international AMSS(R) systems, preventing the development of satellite land mobile services in the U.S.

11. Additionally, the Aviation Parties make several general policy arguments concerning why the Commission should conform the domestic allocation to the international allocation. They contend that the international allocation was the result of a historic compromise in which portions of the aviation and maritime spectrum were carved out to make room for a separate allocation for the land mobile-satellite service. They assert that the international community recognized the legal and practical requirements for protecting needed aviation services and thus retained a separate 20 MHz allocation for AMSS(R), rejecting the "generic" approach advanced by the United

States. The Aviation Parties assert that rather than approving spectrum sharing for aviation, the 1987 Mobile WARC authorized LMSS to use 14 MHz of spectrum on a primary basis and 27 MHz to be shared, on a secondary basis, with maritime satellite systems, giving LMSS access to a total of 41 MHz. The Aviation Parties believe that the separate global allocation for LMSS is reasonable and provides for substantially more spectrum than the Commission allocated for MSS. Accordingly, they assert that the international allocation should be sufficient to serve whatevermarket there may be for MSS.[18]

12. AMSC opposes the Petition for Further Reconsideration and requests affirmation of the Commission's L-band allocations adopted earlier in this proceeding. With respect to the legal issues, AMSC asserts that the Commission's non-conforming allocation is not prohibited. AMSC believes that the new U.S. position taken at the 1987 Mobile WARC, assuming it is ratified by the U.S. Senate, will replace the position previously taken at the 1979 WARC and that the United States will be free to revisit the position it agreed to at the 1979 WARC. In short, AMSC maintains that the result of the reservation is to permit the U.S. to implement its domestic L-band MSS allocation on a non-conforming basis. Further, AMSC disputes the Aviation Parties' claim that the generic MSS system will cause harmful interference to dedicated AMSS(R) systems. AMSC believes that coordination with other satellite systems should be readily achieved and contends that until the outcome of such coordination, the Aviation Parties' contentions to the contrary are mere speculation.

13. In reply, the Aviation Parties reiterate many of their earlier arguments. In particular, they contend that the U.S. reservation to the 1987 Mobile WARC, if read literally, is not a reservation to any act of the conference, but rather merely a declaration of the United States's intent to utilize the relevant bands for other purposes. Moreover, they maintain that the reservation applies only to the 14 MHz allocated internationally for the LMSS, and not the 20 MHz left allocated internationally for AMSS(R). In addition, the Aviation Parties emphasize that the interference to and from international AMSS systems will be unavoidable and submit an engineering report to support their claim. They also contend that the application filed by AMSC acknowledges, but does not list, the inevitable interference with that portion of the next generation of INMARSAT satellites that will use AMSS frequencies for aviation services. The Aviation Parties assert that in any event, the nonconforming domestic MSS system could not be afforded interference protection from international systems.

14. Initially, we note that until the 1987 Mobile WARC is ratified, the allocation scheme established at the 1979 WARC is the treaty provision governing the United States. If the Senate ratifies, and the President signs, the reservation taken by the United States delegation to the 1987 Mobile WARC allocation, then the Commission agrees with the Aviation Parties that the effect would be to maintain the L-band allocation established by the 79 WARC.[19] We have previously recognized in the *Report and Order* [20] that our L-band allocation for MSS is inconsistent with the 1979 international allocation. Nevertheless, as the Aviation Parties themselves recognize, under the treaty administrations are permitted to assign frequencies in derogation of the international Table of Allocations so long as harmful interference is not caused to services carried on by other administrations in accordance with that Table.[21]

15. The Aviation Parties contend that interference from or to other administration's systems cannot be avoided. We believe that it can. In the co-primary AMSS(R)/MSS band, the MSS system will be able to benefit from the international coordination process[22] because of the domestic allocation for AMSS(R) in these bands.[23] In short, because the co-primary band is allocated to AMSS(R) both internationally and domestically, coordination will be required for the domestic AMSS(R) service. As a result, the MSS system, will be able to operate within whatever technical protection is provided for domestic AMSS(R) service.[24] Through coordination, a multitude of techniques and options are available for avoiding mutual interference with international systems.[25] The coordination process involves negotiation with give-and-take on each administration's part, and this process is also recognized by INMARSAT.[26] We are therefore confident that the coordination process will be successful.[27] Accordingly, we believe that the domestic United States allocation can be implemented successfully with the existing international agreement.[28]

16. Moreover, after carefully considering the Aviation Parties arguments, we remain convinced that the domestic L-band allocations adopted in this proceeding will best serve the public interest. As an initial matter, we reiterate that the Commission recognizes and strongly supports the necessity for assuring the primacy of aeronautical safety services. We anticipate that aeronautical mobile-satellite services will play an important role in serving future aeronautical safety requirements. Nonetheless, as elaborated upon earlier in this proceeding, the amount of spectrum that will be necessary in order to satisfy AMSS(R) requirements under normal conditions is substantially less than the 28 MHz at issue here. Thus, the entire international AMSS(R) spectrum of the 79 WARC would not be needed for safety communications all of the time. That portion of the AMSS(R) spectrum that might otherwise remain unused can provide the benefits of the mobile-satellite service. This new service will provide communications to segments of the population that are now unserved, improve communications for certain businesses, and enhance public safety communications. Our allocation is thus consistent with the Commission's responsibility to ensure that the spectrum is used in an efficient manner to serve not only safety requirements, but other requirements as well. We continue to believe that our decision to require sharing of the L-band spectrum between the MSS and AMSS(R) services will result in the most efficient use of the spectrum, and no new information has been submitted that causes us to change this position.[29]

17. The new international allocation scheme favored by the Aviation Parties represents a fundamentally different approach to spectrum allocation. The new international allocation divides the available spectrum into separate blocks for land, aeronautical, and maritime mobile-satellite services. We do not believe a block allocation approach is as efficient as the U.S. allocation because dividing the spectrum into discrete blocks increases the likelihood that the spectrum allocated for one service will prove to be inadequate, while the spectrum for another may be underutilized. The dynamic approach to spectrum allocation contained in our domestic allocations for

AMSS(R) and MSS, wherein spectrum is shared by the two services, will be more responsive to the actual demands of these services as they develop.

18. Furthermore, information submitted earlier in this proceeding indicated that aeronautical safety communications might, in unusual circumstances that create peak conditions, require 28 MHz of spectrum.[30] The U.S. allocation provides the requisite 28 MHz, whereas the new international allocation provides only 20 MHz for AMSS(R). The Commission's allocation thus ensures that sufficient spectrum will be available to meet safety demands in all circumstances. Additionally, the new international allocation of 14 MHz primary spectrum for LMSS is less than the U.S. primary allocation of 18 MHz for MSS. We believe that any reduction in the co-primary spectrum available for MSS could be detrimental to that service. As stated earlier in this proceeding, we believe a primary allocation approaching 20 MHz is necessary to make the MSS a viable service and encourage the necessary investment. No reasons have been advanced that would warrant our changing that finding. Further, 6 MHz of the 14 MHz allocated internationally for LMSS is co-primary with the MMSS. MMSS systems are already in operation; thus, because the coordination process would be time-consuming, it could be many years before the 6 MHz that is co-primary with the MMSS could be made available for LMSS on a shared basis.[31] In contrast, most of the 28 MHz of spectrum at issue here is currently unused and thus will be immediately available for use for MSS.[32] Finally, we note that the 27 MHz of spectrum made available for LMSS internationally on a secondary basis is limited to use of nonspeech, low bit-rate data. As many of the services anticipated for MSS involve voice communications, this spectrum would be of limited value to an MSS licensee.[33]

19. In light of these factors, we find that the domestic allocation better serves the interests of the United States than the new international allocations adopted at the 1987 Mobile WARC. In our view, the U.S. allocation provides a more efficient means of balancing the needs of the AMSS(R) and MSS. Moreover, as discussed above, we do not believe there are any insurmountable obstacles to implementation of the domestic allocation.[34]

The Provision of APC in the AMSS(R)

20. The Aviation Parties contend that the *Reconsideration Order* excluded aircraft public correspondence from the AMSS(R) without adequate notice and comment. In particular, they argue that the Commission's proposal did not signal that in the co-primary band APC would be relegated exclusively to the MSS and that such a rule is not a logical outgrowth of this proceeding. The Aviation Parties also maintain that, contrary to the Commission's position in the *Reconsideration Order*, APC is permitted internationally in the AMSS(R). They argue that the Commission's reliance upon Article 50 of the international *Radio Regulations* was inappropriate because that Article only applied to the Aeronautical Mobile Service (R) (AMS(R)) and not AMSS(R). Further, the Aviation Parties refer to new Footnote 729A of the international Table of Frequency Allocations, as adopted by the 1987 Mobile WARC. The Aviation Parties assert that that footnote confirms that APC is encompassed within AMSS(R).[35] Finally, the Aviation Parties argue that precluding the provision of APC within the AMSS(R) is unreasonable in light of current Commission policies.[36]

21. AMSC disputes the Aviation Parties' contention that APC had not been excluded from the AMSS(R) by the international *Radio Regulations*. AMSC points out that Arinc, one of the Aviation Parties, submitted comments in this very proceeding stating that APC is not permitted in the AMSS(R) spectrum.[37] Further, AMSC contends that Footnote 729A was adopted at the 1987 Mobile WARC because the international *Radio Regulations* did not otherwise contemplate the provision of APC in the AMSS(R) and, thus, Footnote 729A was necessary in order to provide that option. Additionally, AMSC maintains that the footnote does not provide that APC is a service within the AMSS(R), but rather treats it as an alternative use that may be accommodated in the AMSS(R) band on a secondary basis whenever individual countries determine such secondary use of the spectrum would be appropriate.

22. AMSC also contends that the *Notice* provided sufficient notice that the Commission considered APC to be a service within the MSS. AMSC notes that in this rule making, the Commission sought comment on a range of services that might be provided by an MSS licensee, including aeronautical public correspondence.[38] AMSC further argues that the agency had the right to make substantial changes in its proposed plan as long as the changes are in character with the proposed scheme or, as in this situation, are a logical outgrowth of the notice and comments provided. AMSC observes that the Commission later addressed this question with more specificity after the Aviation Parties began to vigorously argue that APC could be provided as part of AMSS(R). Thus, the APC issue, AMSC concludes, was fully aired during the allocation proceeding, and the Commission has adhered to the requirements of the Administrative Procedure Act (APA).

23. In reply, the Aviation Parties respond that Arinc has always contended that APC is permitted in the L-band. They assert that the language AMSC refers to indicated only that if public correspondence were not offered as part of an integrated aeronautical system ensuring proper priority to safety services, a modification of the *Radio Regulations* might be necessary. Furthermore, the Aviation Parties contend that, irrespective of whether the Commission provided adequate notice and comment on its intent to exclude APC from the scope of AMSS(R), that holding came after the 1985 MSS application was cut-off. The Aviation Parties assert that once the cut-off date passed, the Commission cannot subsequently alter the scope of the service being cut-off. Thus, the Aviation Parties argue that while the Commission stated in the *Notice* that MSS use of L-band frequencies may enable them to provide aeronautical public correspondence, the Commission did not indicate that only the MSS licensee would be able to provide this service and that the AMSS(R) licensee would be precluded from offering it.

24. Initially, we disagree with the Aviation Parties' contention that the Commission's holding that APC was not encompassed within the AMSS(R) was adopted without adequate notice and opportunity to comment as required by the APA. Section 553 of the APA requires that the Commission to provide general notice of a proposed rule making that sets forth the "terms or substance of the proposed rule or a description of the subjects and issues involved." As the Aviation Parties correctly point out, the purpose of this rule making has been to allocate the spectrum in the L-band between the MSS and AMSS(R) services and to establish rules for the MSS. Determining

the scope of the services permitted in MSS and AMSS(R) thus goes to the very heart of the allocation issues. It seems obvious, for example, that we could not decide how much spectrum should be made available for AMSS(R) without first determining what AMSS(R) is.

25. Our position on that issue has consistently been that AMSS(R) includes only safety related services and that APC offerings were to be solely within the scope of the MSS.[39] Thus, in the *Notice of Proposed Rule Making*, we indicated that the AMSS(R) band has "been allocated for distress and safety operations as part of a worldwide system."[40] We stressed that aircraft traffic control (ATC) was the principal safety service in this band and noted that "ATC functions include aircraft speed and location information provided to the aircraft and ground stations."[41] In contrast, in the *Notice* we expressly stated that "ATC does not provide passenger communications (air-ground) service, as suggested by some 'aerosat' proposals."[42] We also noted that the mobile satellite service may provide aeronautical services such as radiotelephone (air-to-ground) services for airline passengers.[43] Accordingly, we think all parties had clear notice that the AMSS(R) services would encompass safety and related ATC services, but not passenger telephone service.[44]

26. Moreover, allowing the provision of APC in the AMSS(R) would defeat the allocation policies adopted in this proceeding. Because we viewed the (R) designation as indicating that the spectrum was reserved for aeronautical communications related to safety and regularity of flight along national and international civil air routes, we allowed priority access for the AMSS(R) in that portion of the L-band that is co-primary with MSS.[45] Had we envisioned that AMSS(R) included general public correspondence, as well as safety related services, there would have been no reason to give the AMSS(R) services a blanket priority over MSS.[46]

27. Furthermore, our understanding of the scope of AMSS(R) is consistent with the international *Radio Regulations*. The International *Radio Regulations*, Article 1, define "AMSS" very generally as "a mobile-satellite service in which earth stations are located on board aircraft." This definition does not explain the meaning of the (R) restriction in the AMSS(R) designation. However, section 1 of Article 50 of the *Radio Regulations*, as amended by the 1987 Mobile WARC, provides that the (R) designation means that AMSS(R) services "are reserved for communications relating to safety and regularity of flight . . . along national or international civil air routes." In addition, section 4 of Article 50 specifically provides that public correspondence shall not be permitted in the frequency bands allocated to AMSS(R). Prior to the amendments to Article 50 at the 1987 Mobile WARC, Sections 1 and 4 of Article 50 contained the same language with the exception that they mentioned expressly only the AMS(R). AMS(R) and AMSS(R) services are essentially the same, however, except that the former does not use satellites. Thus our discussions in the *Notice* in Docket No. 84-1234, specifying the types of "safety-related services" permitted in AMSS(R) bands, were based on former sections 1 and 4 of Article 50, and the subsequent 1987 Mobile WARC amendments to Article 50 confirm the import of the "(R)" designation as it applies to both AMSS(R) and AMS(R).[47] We believe that, both before and after the 1987 amendments, our interpretation of the (R) designation as denoting safety related services was proper. Additionally, neither the pre- nor post-87 Mobile WARC versions of Article 51, which list the order of priority of communications in both the AMS and AMSS, recognize APC as a type of communication in these services. Accordingly, our conclusion that AMSS(R) does not include the provision of APC is fully supported by the international *Radio Regulations*, both before and after the 1987 WARC. In any event, as discussed previously, parties had clear notice that for purposes of our domestic allocation, we considered AMSS(R) services to be limited to services related to safety and regularity of flight and the service was not broadly defined in the *Notice* to encompass every conceivable type of aeronautical mobile service. Indeed, our references to "safety" related services and the provision of ATC in the *Notice's* discussions of AMSS(R) could not have failed to alert commenters that we viewed the "R" designation as imposing specific restrictions on the types of services that were permitted in AMSS(R) bands.

28. Arinc believes that Footnote 729A, adopted at the 1987 Mobile WARC, and subsequent to the *Report and Order*, confirms its view that the international *Radio Regulations* do not prohibit the provision of APC in the AMSS(R).[48] Footnote 729A now permits administrations, in their discretion, to allow public correspondence in the 10 MHz aeronautical bands (1545.0-1549.5/1646.5-1651 MHz and 1558.5-1559.0/1660.0-1660.5 MHz), We agree with AMSC that this footnote did not change the import of the AMSS(R) designation itself. More to the point, however, our domestic allocation of spectrum between MSS and AMSS(R) was premised upon our view that APC would not be encompassed within AMSS(R). We found that 10 MHz should be sufficient for an AMSS(R) licensee to provide routine AMSS(R) services -- that is, ATC -- in most circumstances.[49] Further, we explained that it would be necessary to allocate the remainder of the L-band, 18 MHz, to MSS, in order to ensure that the MSS is viable. To conclude now that the AMSS(R) licensee should be permitted to provide APC would undermine this allocation and the scheme of spectrum priorities developed in these proceedings.

29. Furthermore, in order to apply Footnote 729A to AMSS(R), we would have to entertain a new round of comments to determine how much more spectrum should be allocated to AMSS(R) and to develop new rules for sharing the spectrum. This process would further extend this rule making and the public would be denied MSS service for an indeterminate amount of time. We do not believe such additional regulatory delay is warranted. The chief public benefit that Arinc has suggested might arise from such further proceedings would be a possible increase in competition through the addition of another provider of APC. There should, however, be a sufficient number of providers of APC service to ensure adequate competition without the AMSS(R) licensee also providing this service. GTE Airfone is currently providing this service terrestrially, pursuant to an experimental licensee, on 4 MHz in the 900 MHz band (849-851/894-896 MHz).[50] We have recently proposed to make this spectrum available to one or two licensees on a permanent basis.[51] Further, the MSS licensee will be a common carrier, and vendors will be able to resell the services it offers, including APC. Thus, these vendors would also provide some competition to the MSS licensee. Finally, any APC system will, to some extent, have to compete with pay telephones in airports.[52] In light of the foregoing, we conclude that for the forseeable future exploring the possibility of allowing APC within the AMSS(R) is not in the public interest.

Legality of Footnote US 308

30. The Aviation Parties contend that the *Reconsideration Order's* modification of Footnote US308 adopted substantive provisions governing the provision of AMSS(R) without the requisite notice and opportunity to comment. In particular, the Aviation Parties assert that Footnote US308, as modified, guarantees the ultimate MSS licensee a certain portion of the aviation traffic, namely, any of the AMSS(R) traffic that overflows the 10 MHz primary allocation for AMSS(R).[53] The Aviation Parties state that this action has the effect of precluding a separate AMSS(R) system in the co-primary spectrum. The Aviation Parties contend that the *Notice* in this proceeding did not contemplate a review of the scope of AMSS(R) and the sharing proposal for the L-band never suggested that AMSS(R) traffic, when it achieved a certain volume, would have to be routed over the MSS system.[54] The Aviation Parties therefore conclude that these modifications to Footnote US308 were adopted without adequate notice.[55]

31. The Aviation Parties also contend that as a result of the Commission's actions, the *Ashbacker* rights[56] of those parties who may have intended to apply to be the AMSS(R) licensee have been affected. More particularly, the Aviation Parties argue that the Commission failed to fairly advise prospective applicants of what was being cut off when it established a filing deadline for mobile-satellite applications.[57] The Aviation Parties claim that they could not have ascertained from the *Notice* in this proceeding and the associated request for applications that they had to file by the cut-off date if they wished to provide AMSS(R) in what is now the co-primary portion of the L-band. Indeed, they note that the FCC Chief Scientist indicated that they need not apply then.

32. The Aviation Parties also maintain that Footnote US308 is inconsistent with the Commission's *Report and Order*, because the *Report and Order* indicates that the 18 MHz of co-primary spectrum would be shared. They observe that to the extent the AMSS(R) system licensee will not be able to access the co-primary spectrum itself, co-primary does not mean co-primary.

33. Finally, the Aviation Parties contend that to the extent that the Commission's sharing scheme for the co-primary band requires that the MSS licensee's system be capable of interoperating with the AMSS(R) system and provides for the preemptive access of AMSS(R) communications, that scheme is fundamentally flawed. While noting that the term "interoperability" is not defined, the Aviation Parties interpret it to mean that the MSS provider must be compatible with all international AMSS(R) systems. They argue that MSS providers will not be able to design a system that will be interoperable with a multiplicity of AMSS(R) systems. Therefore, as required by the Commission's rules, MSS in the co-primary band will, according to the Aviation Parties, be relegated to a secondary status. In support of this conclusion, Aviation Parties note that standards and designs for AMSS(R) are now being developed by the aviation community. Aviation users, however, may have the choice of several satellite systems such as Volna,[58] and INMARSAT.[59] The Aviation Parties state that because there is no international requirement for interoperability, the several AMSS(R) systems serving various aviation interests may not all be consistent with whatever design the MSS consortium ultimately adopts.[60] Thus, the Aviation Parties contend that until the Commission opens a proceeding to look at the sharing issue there is no way to ensure interoperability internationally.

34. AMSC responds that the record supported the Commission's conclusion that if AMSS(R) traffic requires spectrum beyond the 10 MHz primary allocation, it must be accommodated by real-time preemptive access on the MSS system in the shared 18 MHz. AMSC maintains that this proposition was inherent in the sharing concept discussed at length in this proceeding and in US308, which was the subject of vigorous debate in the reconsideration phase of this proceeding. AMSC asserts that for this reason, the Aviation Parties' "notice" arguments regarding Footnote US308 must be rejected.

35. AMSC rejects the argument that interoperability will be unworkable. AMSC states that it understands this requirement as applying only to intra-system compatibility, *i.e.*, the ability of a generic MSS system to provide priority access to domestic AMSS(R) communications. AMSC does not believe that the requirement applies to interoperability with other international systems. AMSC states that it stands ready to work with the Commission and others to develop guidelines for the provision of AMSS(R) services on the U.S. MSS system. AMSC states that its system will use a sophisticated Priority Demand Assignment Multiple Access technology at a Network Operations Center, that will enable the MSS system operator to ensure priority and real-time preemptive access for AMSS(R) and other safety uses. AMSC believes that a generic MSS system will be capable of providing the required interoperability and preemption capability to meet the needs of aviation users.

36. In reply, the Aviation Parties elaborate upon their *Ashbacker* argument. They contend that their *Ashbacker* rights were violated both to the extent that Footnote US308 was modified to provide the MSS licensee with sole control over the co-primary spectrum and to the extent AMSS(R) was defined as not including APC. In an expansion of this argument, they assert that both of these actions resulted in an impermissible retroactive rule making because neither provision was set forth in the *Notice*.

37. The Aviation Parties' contention that the Commission's clarification of Footnote US308 in the *Reconsideration Order* was adopted without adequate notice and comment is without merit. Throughout this proceeding, the principle issue has been how the L-band should be allocated between MSS and AMSS(R). As noted previously, resolution of that issue necessitated that we address the scope of both AMSS(R) and MSS services. In this regard, we expressly observed in the *Notice* that "[s]ome ATC functions could be provided by MSS."[61] As discussed earlier, we also indicated clearly that AMSS(R) would encompass safety-related or ATC services. In addition, we proposed to either reallocate spectrum from AMSS(R) to MSS or have the two services share the spectrum.[62] In the *Report and Order*, we adopted an allocation scheme that provided for the two services to share 18 MHz of the L-band on a co-primary basis. Footnote US308 provided the actual mechanics for the shared use of the band.[63] This footnote thus arose as part of the Commission's allocation proposal to permit sharing of the bands.

38. The Aviation Parties appear to agree that we afforded notice that we might adopt a sharing proposal. Their concern appears to be that we gave inadequate notice of the precise manner in which sharing would be

accomplished as set forth in the footnote on reconsideration. We think our modifications to Footnote US308 on reconsideration were a "logical outgrowth" of the sharing and allocations issues explored in this proceeding, adopted after appropriate notice and an opportunity to comment. As we explained in the *Reconsideration Order*, unless sharing were accomplished in the manner set forth on reconsideration, the entire MSS system would be required to shut down in order to accommodate the relatively small amounts of AMSS(R) traffic that we expected in the co-primary band.[64] Such a result would have been fundamentally at odds with our efforts to allocate enough spectrum for MSS to protect the viability of the system. Moreover, this result was fully consistent with our statement in the *Notice* that the MSS licensee might provide some ATC functions. Accordingly, we conclude that our resolution of the sharing issue was a logical and expected outgrowth of the policies and issues explored in this proceeding and that we have fully complied with the notice requirement of the APA.

39. We also reject the Aviation Parties' argument that their *Ashbacker* rights have been compromised.[65] The Aviation Parties' argument hinges on their contention that the Commission, subsequent to the issuance of the *Notice* and the cut-off date for the filing of MSS applications, modified its spectrum allocation decision, in particular Footnote US308, so as to preclude any ultimate AMSS(R) licensee from being able to operate in the co-primary spectrum. In other words, to the extent Footnote US308 had the effect of giving the MSS licensee exclusive use of the co-primary band, the Aviation Parties believe that they were not given adequate notice of this before the expiration of the cut-off period for MSS applications and were thereby denied the opportunity to utilize this portion of the L-band. The Aviation Parties do not specify whether, had they known our final allocation policies, they would have filed an AMSS(R) or an MSS application before the cut-off date. Assuming, however, that they would have filed an AMSS(R) application, we note that filing an AMSS(R) application before the cut-off date would not have secured them the opportunity to use the co-primary spectrum. The preclusion of a separate AMSS(R) system in the co-primary bands arises as a consequence of the rules adopted in this proceeding, not the cut-off date. Those rules would have applied to any AMSS(R) applicant, irrespective of whether its application was filed before or after the cut-off date. Further, potential AMSS(R) licensees had no assurance that they would be able to operate in any specific part of the band in question. Our *Notice* in this proceeding explicitly proposed the alternative of reallocating an unspecified portion of the L-band from AMSS(R) to MSS.[66] Accordingly, from the very beginning of this proceeding, and before the cut-off date, potential licensees had clear notice that if they simply wanted to ensure that they could operate in all of the L-band spectrum, they would need to apply for both the AMSS(R) and MSS services. [67]

40. Similarly, as to the Aviation Parties' claim concerning *Ashbacker* and "retroactivity," in which they suggest that "notice" of the scope of AMSS(R) and MSS services was given only in the *Reconsideration Order* after the cut-off date for MSS applications, we reiterate that the *Notice* itself gave notice of the scope of MSS and AMSS(R) services. In particular, we gave explicit notice that the MSS licensee could provide both ATC and public correspondence services, and that AMSS(R) would be limited to services related to safety and regularity of flight including ATC and aircraft operational communications (AOC).

41. Additionally, to the extent that the Aviation Parties may be arguing more generally that the Commission cannot apply new spectrum allocation rules to pending applications,[68] we reject any claim that this constitutes impermissible "retroactive" rule making. First, the Aviation Parties had no "antecedent right" to use this spectrum for AMSS(R) services prior to adoption of the rules in this proceeding. In fact, the Aviation Parties do not hold AMSS(R) licenses. In any event, it is clear that the application of new FCC rules to pending applications is permissible under the Communications Act.[69]

42. We also disagree with the Aviation Parties' contention that Footnote US308 will be unworkable because it will not be possible to provide interoperability to all other international systems. It was never our intention to require that our domestic MSS system be interoperable with all foreign systems for the provision of all mobile-satellite services but only to require that it be interoperable for AMSS(R) communications services related to safety and regularity of flight. Footnote 308 to the U.S. Table of Frequency Allocations is pertinent to those systems that will be providing services to the U.S., whether domestic or international systems. While interoperability with all international systems may be desirable, our requirement for interoperability with international systems extends only to those mobile-satellite systems providing the aeronautical mobile-satellite (R) service. Footnote US308 states further that systems not interoperable with the aeronautical mobile-satellite (R) service shall operate on a secondary basis. We believe that interoperability with international AMSS(R) systems can be achieved by having the U.S. licensee of the domestic service incorporate into its overall system design whatever minimum requirements for aeronautical satellite communications systems are endorsed internationally by ICAO[70] and establishing appropriate arrangements for handing off AMSS(R) traffic between its system and others, such as Canada's and INMARSAT's.[71]

Consistency of Reconsideration Order with Commission's Policies

43. The Aviation Parties contend that the allocation decisions adopted in the *Reconsideration Order* are contrary to the Commission's efforts to promote competition, to rely on the marketplace instead of agency fiat, and to deregulate the provision of new services where possible. They contend that the new rules have the effect of precluding competition because they guarantee a dominant market share to the MSS licensee. As for Footnote US308, in particular, the Aviation Parties contend, with little explanation, that the Commission's allocation scheme is unnecessary to achieve its policies and unnecessarily micro-manages commercial decision-making.

44. AMSC states that contrary to the Aviation Parties' assertions, the *Reconsideration Order* is consistent with the FCC's efforts to promote competition and deregulation. According to AMSC, the Aviation Parties fundamentally misconstrue the Commission's policy. AMSC maintains that the Commission's general policy is not the fostering of competition for its own sake; rather, its goal is the protection of the public interest, and in pursuit of that goal the FCC tries to foster competition wherever that is the best means of serving the public interest. AMSC con-

tends that in this case the Commission has held that providing a broad range of MSS services is in the public interest, and also that competition in the provision of the MSS space segment is neither technically nor economically feasible at this time. AMSC states that given those findings, it is entirely appropriate for the FCC to reserve the provision of certain services, such as APC, exclusively to the MSS licensee. AMSC states that if, as the Aviation Parties urge, others are permitted to "cherry-pick" the most desirable MSS services and offer them on other satellite systems, many other functions of an MSS system -- such as land public safety services and services to remote and rural areas -- might never become available at all because a generic MSS system might not be economically viable.

45. GTE Airfone, Inc. (GTE) states that contrary to the assertions in the Aviation Parties' petition, air-ground public correspondence cannot be characterized as a monopoly, whether or not it is provided via AMSS(R). GTE asserts that a primary source of competition to any satellite service providing public correspondence will be terrestrial air-ground service. GTE points out that it has been offering air-ground public correspondence service on an experimental basis and is interested in offering this service on a permanent basis.[72] GTE adds that service from INMARSAT and the developmental efforts of British Telecom's Skyphone system and others will provide direct competition. Accordingly, GTE urges the Commission not to rely on that part of the Aviation Parties' petition in which it mistakenly states that air-ground public correspondence is or could be monopolized by MSS to the detriment of competition.

46. We do not consider the policies adopted in this proceeding to be inconsistent with prior Commission precedent. As the Aviation Parties observe, we will generally deregulate and rely upon marketplace forces whenever we can reasonably conclude that that approach will best serve the public interest. In this instance, however, the spectrum constraints of the L-band necessitate our promulgating some regulatory policies in order to ensure that both of these services will be viable. Thus, as we discussed above, we have determined to provide the MSS licensee with sole direct access to the co-primary spectrum in order to ensure that such a system will be viable. In order to ensure that aeronautical safety services have adequate spectrum available during peak periods, however, they have been accorded preemptive access to the 18 MHz co-primary spectrum. Moreover, as discussed in paragraph 29 above, authorizing the AMSS(R) licensee to provide APC would upset this balance. Contrary to the Aviation Parties' arguments, we also do not consider this decision to be anticompetitive. Again, as we discussed in paragraph 29 above and as GTE's comments demonstrate, there will be substantial competition in the provision of APC. While an additional APC provider would certainly be welcome, we find that the limited spectrum in the L-band makes that option infeasible in this instance.

CONCLUSION

47. In conclusion, we find that the Aviation Parties have brought forward no new information that warrants modification of the decision in the *Reconsideration Order*. We believe our domestic allocation is in the best interests of the public. The U.S. allocation ensures a greater amount of spectrum will be available when needed for AMSS(R) than the new international allocation. This provides greater assurance that aeronautical safety needs will be met even under peak conditions. Further, the U.S. allocation provides a greater amount of primary spectrum for MSS than under the new international allocation. This policy encourages the investment necessary to initiate this service. Thus, the U.S. allocation better serves both the MSS and the AMSS(R). We do not foresee any obstacles that will preclude successful international coordination of the U.S. domestic system.

48. For the reasons given in the foregoing discussion, IT IS ORDERED that the Petition for Further Reconsideration of the Aviation Parties IS DENIED.

49. IT IS ORDERED that the Motion to Accept submitted by Arinc and the Air Transport Association seeking to have the Commission admit into the record of this proceeding the Petition to Deny the Joint Amendment to the MSS applications filed by AMSC IS DENIED.[73]

50. IT IS ORDERED that the Motion for Extension of Page Limitation submitted on February 10, 1989 filed by the Aviation Parties in regard to their Reply Comment in this proceeding IS GRANTED. We agree with the Aviation Parties that the issues are of such a complex nature as to warrant this request.

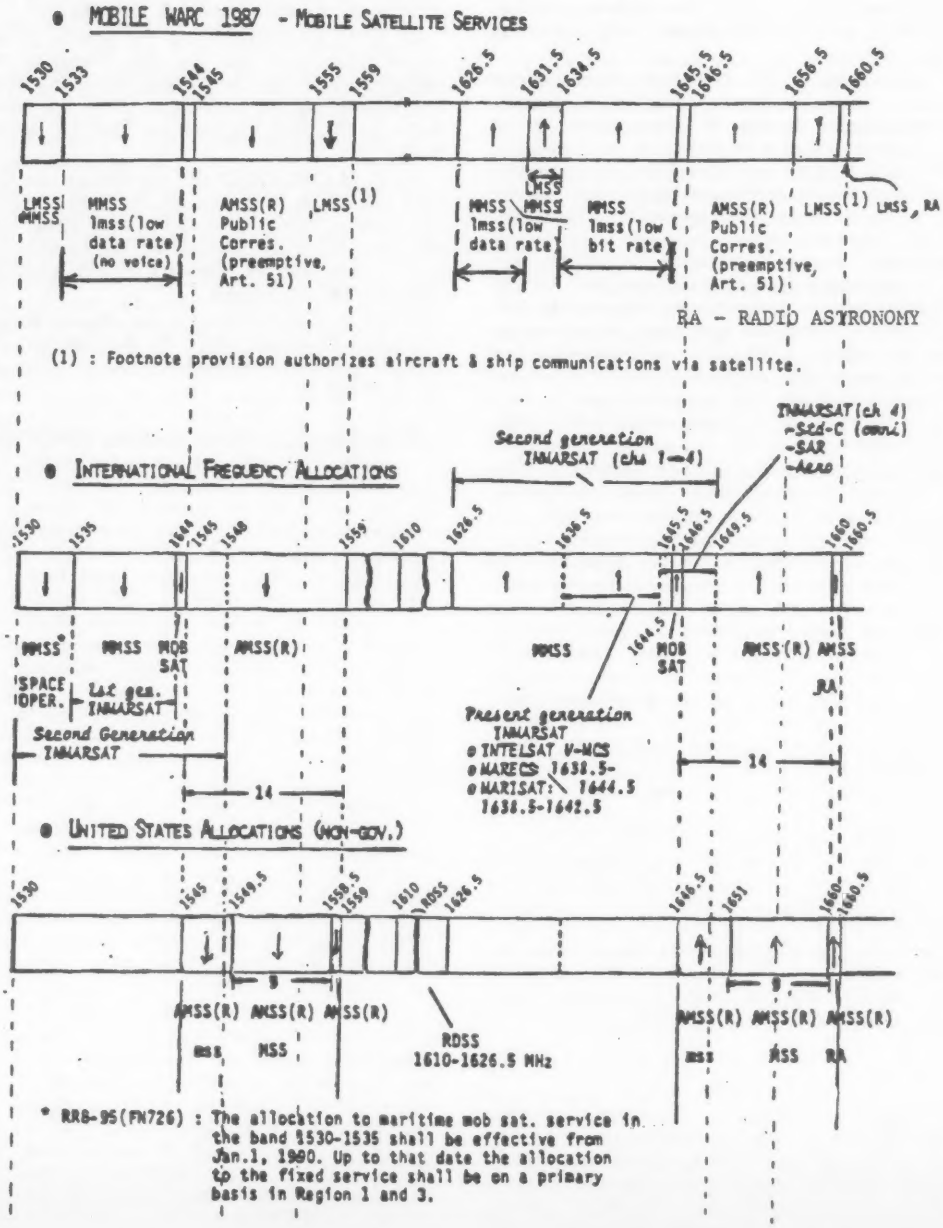
51. IT IS ORDERED that the Motion to Accept Supplemental Comments filed by Aeronautical Radio, Inc. and Air Transport Association of America on May 4, 1989 IS ACCEPTED.[74]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

MOBILE-SATELLITE SERVICES
SPECTRUM ALLOCATIONS BOTH INTERNATIONAL AND DOMESTIC
(all frequencies in MHz)


• MOBILE WARC 1987 - MOBILE SATELLITE SERVICES
1530 1533 1544 1545 1555 1559 1626.5 1631.5 1634.5 1645.5 1646.5 1656.5 1660.5
LMSS MMSS
MMSS lmss (low data rate) (no voice)
AMSS(R) Public Corres. (preemptive, Art. 51)
LMSS (1)
LMSS MMSS
MMSS lmss (low data rate)
MMSS lmss (low bit rate)
AMSS(R) Public Corres. (preemptive, Art. 51)
LMSS (1)
LMSS, RA
RA - RADIO ASTRONOMY
(1) : Footnote provision authorizes aircraft & ship communications via satellite.
• INTERNATIONAL FREQUENCY ALLOCATIONS
Second generation INMARSAT (ch 1-4)
INMARSAT (ch 4) -Std-C (omni) -SAR -Aero
1530 1535 1544 1545 1540 1559 1610 1626.5 1636.5 1645.5 1646.5 1649.5 1660 1660.5
MMSS* MMSS SPACE OPER. MOB SAT AMSS(R) MMSS MOB SAT AMSS(R) AMSS RA
Lst gen. INMARSAT
Second Generation INMARSAT
Present generation INMARSAT
• INTELSAT V-MCS
• MARECS 1638.5-
• MARISAT: 1644.5 1638.5-1642.5
14
14
• UNITED STATES ALLOCATIONS (NON-GOV.)
1530 1545 1549.5 1558.5 1559 1610 RDSS 1626.5 1646.5 1651 1660 1660.5
9
9
AMSS(R) AMSS(R) AMSS(R)
MSS MSS
RDSS 1610-1626.5 MHz
AMSS(R) AMSS(R) AMSS(R)
MSS MSS RA
* RR8-95(FN726) : The allocation to maritime mob sat. service in the band 1530-1535 shall be effective from Jan.1, 1990. Up to that date the allocation to the fixed service shall be on a primary basis in Region 1 and 3.

FOOTNOTES

[1] *See Reconsideration Order*, Gen. Docket Nos. 84-1231, 84-1233, and 84-1234, 2 FCC Rcd 6830 (1987).

[2] The Aviation Parties are Aeronautical Radio, Inc., the Air Transport Association of America, the Aircraft Owners and Pilots Association, the Air Line Pilots Association, the Regional Airline Association, the National Air Transportation Association, and the Helicopter Association International.

[3] The mobile-satellite service refers to a generic satellite service consisting of elements of the land mobile-satellite service (LMSS), the aeronautical mobile-satellite service (AMSS) including aeronautical safety and regularity of flight communications (AMSS(R)), and the maritime mobile-satellite service (MMSS).

[4] The term L-band generally refers to the frequency range 390 MHz to 1.55 GHz. For purposes of this proceeding, the term L-band refers to the frequencies in the 1.5/1.6 GHz region of the spectrum.

[5] *See Report and Order*, Gen. Docket Nos. 84-1231, 84-1233, and 84-1234, 2 FCC Rcd 1825 (1986).

[6] *Id.*

[7] Footnote US308 to the Table of Frequency Allocations, 47 CFR Section 2.106, was promulgated in this rule making to delineate when AMSS(R) operations would have priority access in the co-primary spectrum for aeronautical safety communications over other MSS use in this sub-band. The Commission stated it expected to initiate a further rule making proceeding on the issue of priority access to resolve any future concerns that might arise. *See Report and Order*, *supra*, n. 118; *Reconsideration Order*, *supra* at para. 54.

[8] *See Second Report and Order*, Gen. Docket No. 84-1234, 2 FCC Rcd 485 (1987).

[9] *See Reconsideration Order* Gen. Docket Nos. 84-1231, 84-1233, 84-1234, *supra*.

[10] *See Reconsideration Order*, Gen. Docket No. 84-1234, *supra*., paras. 50-55. Both the Aviation Parties and MSS interests in their petitions for reconsideration of the *Report and Order* requested clarification of Footnote US308. The Aviation parties indicated that the footnote could be read to imply that only shared satellites would be authorized. Further, both parties indicated that US308 did not address how priority access would be implemented if the Commission were to ultimately authorize separate AMSS(R) and MSS Systems.

[11] The text of US308 adopted in the *Report and Order* read as follows:

> US308 In the frequency bands 1549.5-1558.5 MHz and 1651-1660 MHz, the Aeronautical Mobile-Satellite (R) requirements that cannot be accommodated in the 1545-1549.5 MHz, 1558.5- 1559 MHz, 1646.5-1651 MHz and 1660-1660.5 MHz bands shall have priority access in the Mobile-Satellite service. All other users of the Mobile-Satellite service are subject to preemption based on this priority access.

The text of the revised US308 adopted in the *Reconsideration Order* reads as follows:

> US308 In the frequency bands 1549.5-1558.5 MHz and 1651-1660 MHz, the Aeronautical Mobile-Satellite (R) requirements that cannot be accommodated in the 1545-1549.5 MHz, 1558.5-1559 MHz, 1646.5-1651 MHz and 1660-1660.5 MHz bands shall have priority access with real-time preemptive capability for communications in the Mobile-Satellite service. Systems not interoperable with the Aeronautical Mobile-Satellite (R) service shall operate on a secondary basis. Account shall be taken of the priority of safety-related communications in the Mobile-Satellite service.

[12] The International Telecommunication Union (ITU) through the International Radio Consultative Committee (CCIR) has established Interim Working Party 8/14 to consider mobile-satellite systems which provide one or more of the following mobile-satellite services:

> - aeronautical mobile-satellite service, which includes aeronautical safety and regularity of flight communications, aeronautical administrative communications and aeronautical public correspondence.
> - land mobile-satellite service (LMSS).
> - maritime mobile-satellite service including studies in connection with the Global Maritime Distress and Safety System (GMDSS).

Among other things, the working party was tasked with studying, to the extent necessary, the preferred technical and operating characteristics of mobile-satellite systems and the potential compatibilities between these systems. *See Conclusions of the Interim Meeting of Study Group*, Mobile Satellite Services (Aeronautical, Land, Maritime, Mobile, and Radiodetermination), Aeronautical Mobile Service, VIII-3, Geneva, Switzerland, April 20-May 6, 1988.

[13] *See* the chart in Appendix I for the pre-Mobile WARC allocation; the 1987 Mobile WARC allocation; and the U.S. domestic allocation.

[14] *See International Telecommunication Union, Final Acts of the WARC for the Mobile Services MOB-87*, Geneva, October, Final Protocol, 1987.

[15] The Opposition was filed by the "MSS consortium," which later established a business agreement formally identifying the group as the American Mobile Satellite Consortium. More recently AMSC changed its business name to the American Mobile Satellite Corporation. AMSC consists of Hughes Communications Mobile Satellite Services, Inc., MCCA Space Technologies Corporation, McCaw Space Technologies, Inc., Mobile Satellite Corporation, North American Mobile Satellite, Inc., Satellite Mobile Telephone Company, Skylink Corporation, and Transit Communications.

[16] Petition for Further Reconsideration at pages 5 and 6.

[17] International *Radio Regulation* 342 (Article 6-4) states that "administrations of the Members shall not assign to a station any frequency in derogation of either the Table of Frequency Allocations given in this Chapter or the other provisions of these Regulations except on the express condition that harmful interference shall not be caused to services carried on by stations operating in accordance with the provisions of the Convention and these Regulations." The Aviation Parties also cite ITU Convention, Article 25 (Nairobi 1982) which provides that international telecommunications concerning safety of life at sea, on land, and in the air must be given absolute priority. They believe that the proposed MSS system would be particularly harmful to a safety service; i.e., the AMSS(R) service.

[18] The Aviation Parties also suggest that if the U.S. turns its back on the international consensus, the country's leadership role in an otherwise cohesive international aviation community

will be seriously undermined. According to the petitioners, this would have a severe and deleterious impact on both domestic technological innovation and international trade concerns.

[19] In this regard, however, we disagree with the Aviation Parties' contention that the reservation fails to reserve to the United States the right not to comply with the 1987 Mobile WARC allocation plan for the L-band frequencies at issue. The language of the reservation is clearly a reservation to the international allocation scheme for AMSS, LMSS, and MMSS.

[20] 2 FCC Rcd 1825, 1844 n. 114 (1987).

[21] *See* international *Radio Regulation* 342 (Article 6), *supra* n. 17. Even assuming the Senate were to ratify the 1987 WARC without the reservation, the Commission could adopt a nonconforming domestic allocation under Radio Regulation 342.

[22] The international frequency coordination process is described in Articles 11 and 14 of the international *Radio Regulations*. The coordination process consists basically of three phases: 1) the first phase is the advance publication phase during which an administration is required to provide certain information regarding its planned satellite systems prior to the coordination process; 2) the second phase is the frequency coordination phase, when an administration requests coordination of any frequency assignment that will be used with either a space station in a geostationary satellite orbit or with an earth station; and 3) the third phase occurs when notification and recording of the frequency assignment is made to the IFRB.

[23] For this reason, the Aviation Parties' arguments in their Supplemental Comments that AMSC will not be able to coordinate much of the L-band because it is an LMSS licensee is without merit. Additionally, the Aviation Parties contend that AMSC has admitted it cannot coordinate. We find that this contention misconstrues AMSC's pleadings. In its opposition to the Supplemental Comments, AMSC reiterated that it considers coordination to be possible. *See* Opposition of American Mobile Satellite Corporation to Motion to Accept Supplemental Comments, at page 4. Moreover, while AMSC does recognize that apportionment of the L-band spectrum might be required in order to effectuate coordination, this does not mean that it considers coordination impossible. Apportionment is one valid approach, although not the only means, of coordinating spectrum.

[24] In addition, under the 1987 Mobile WARC allocation, the upper 4 MHz of each of the co-primary bands is internationally allocated to LMSS. Therefore, the LMSS, included in the MSS system, would be entitled to coordination in its own right under that allocation.

[25] Many of these measures have been identified in technical contributions submitted by various administrations to CCIR Interim Working Party 8/14 (IWP8/14) and Study Group 4. These measures include, but are not limited to: 1) using angular directivity of the transmitting and receiving antennas on board spacecraft and the earth stations; 2) using opposite polarizations on the wanted and the interfering signals; 3) interleaving channels to avoid full co-channel operation; 4) accepting higher permissible single entry interference criteria; and 5) using stochastic approaches in the evaluation of interference between satellite networks.

[26] *See Notes for Remarks by Olof Lundberg, Director General, INMARSAT, to the Fourth International Conference on Satellite Systems for Mobile Communications and Navigation, Institute of Electrical Engineers*, London, England, October 17, 1987.

[27] Because coordination requires an interaction between actual licensees with concrete system proposals, it is too early to state with any certainty precisely how coordination would be effectuated.

[28] We are confident for the same reasons that interference to the MSS licensee's operations will be avoided through the coordination process.

[29] We also reject the Aviation Parties contention in footnote 29 of its *Petition for Further Reconsideration* that the Commission has treated the MSS interests and the Aviation Parties differently in that, in this rule making, it has required a very specific need showing from the Aviation Parties in order to justify their spectrum requests while accepting a more general showing from the MSS interests. This difference in treatment arises because of the differences in the services. Because MSS is new and will be providing a multitude of satellite services, most of which will be competing with similar terrestrial services, it is difficult to predict the extent of demand for any particular service. Nevertheless, as an MSS licensee will be able to provide a multitude of services, we may reasonably assume that substantial demand will exist for some of these services. *See Notice* at paras. 4 and 5. AMSS(R), on the other hand, consists of a far more limited range of safety-related services that will be offered in conjunction with existing terrestrial services. Thus, for allocation purposes, the Aviation Parties should be able to quantify with a fair degree of precision the amount of spectrum required to satisfy future air traffic control spectrum requirements.

[30] *See Reconsideration Order*, Gen. Docket Nos. 84-1231, 84-1233, and 84-1234, 2 FCC Rcd. at 6834.

[31] We recognize that INMARSAT capacity in the co-primary 6 MHz may be used on an interim basis by parties in the United States to offer land mobile satellite service, subject to Commission approval. At this time INMARSAT has not yet amended its charter to encompass land mobile-satellite services; however, this is anticipated in the future. We note that INMARSAT plans to use its existing satellites to offer its Standard C (low speed data) service in this spectrum, and Standard C lends itself to use for land mobile-satellite service. In any event, use of the co-primary 6 MHz by a separate U.S. system may take considerable time to resolve.

[32] INMARSAT plans to initiate aeronautical service on 6 MHz of the 28 MHz of spectrum. In October 1985, INMARSAT proposed amendments to the Convention and Operating Agreement to allow it to provide aeronautical services.

[33] On June 26, 1988, the Commission received a Petition for Rule Making from Geostar Messaging Corporation (Geostar) to amend the Commission's Table of Frequency Allocations to establish a Digital Land Mobile-Satellite Service on those frequencies allocated to the Land Mobile-Satellite Service from the MMSS bands at the 1987 Mobile WARC. *See RM-6459*. This petition is now pending before the Commission and will be considered separately.

[34] We also find unconvincing the Aviation Parties' concern that our failure to conform the domestic allocation to the international allocation will harm the stature of the United States in the international community. The United States's decision to depart from the international table of allocations in one minor respect is not a matter of major significance. Furthermore, the reservation taken by the United States's delegation to the international allocation ensured that other countries were aware that the United States did not intend to follow the international allocation. We note that the United States was not the only country to take a reservation to the international allocation scheme; Canada also has taken a reservation to this aspect of the international allocation.

[35] *See International Telecommunications Union, Final Acts of the WARC for the Mobile Services MOB-87*, Geneva, October. Final Protocal, 1987.

[36] In this regard, the Aviation Parties point to a recent Commission decision in which we permitted digital transmission of administrative messages on domestic VHF aeronautical enroute frequencies. *See Digital Administrative Communications in the Aviation Service (Digital)*, 60 Rad. Reg. 2d 1313 (1986). However, in that proceeding, all commenters agreed that to permit messages limited to on-board provisioning and inventory in the bands would be consistent with the safe, efficient, and economical operation of aircraft as defined by Section 87.291 of the Rules. Further, we expressly noted that "[t]he only express prohibition in the international regime on use of the aeronautical mobile (R) band is on public correspondence." The Commission cited *Radio Regulation* No. 3633 as authority on this matter. The conclusions reached in the *Digital* proceeding are thus fully consistent with our determination herein that public correspondence services should not be permitted in AMSS(R) allocations.

[37] *See* Reply Comments submitted on the *Notice*, Gen. Docket No. 84-1234, filed by Air Transport Association of America and Aeronautical Radio, Inc. (Arinc), n. 31. The full text of n. 31 reads as follows: "Public correspondence is currently prohibited at L-band. *See* ITU *Rad. Reg.* 3633 (rev. 1985). CCIR Study Group 8 currently is examining the appropriate spectrum for an aeronautical public telephone system. *See* Working Group 8-E, Question No. BF/8, Doc. 8/155 (May 23, 1984)." In its comments Arinc indicated that if the Commission supported the introduction of air-ground public correspondence, it could only be permitted as part of a fully integrated aeronautical system and might require modification of the international *Radio Regulations*. *Id.* at page 11.

[38] *See Notice*, Gen. Docket No. 84-1234, *supra*, at para. 47.

[39] We also note Arinc's statement in its Reply Comments that were filed at the Notice stage of this proceeding, wherein it stated that "[p]ublic correspondence is currently prohibited at L-band." *See* Reply Comments on the *Notice*, Gen. Docket No. 84-1234, filed by Arinc and the Aircraft Transportation Association, *supra*. The Aviation Parties claim that AMSC has taken Arinc's statement out of context. However, we do not believe that the Aviation Parties have adequately explained why this statement should not be taken literally.

[40] *See Notice*, *supra* at n. 46

[41] *See Notice of Proposed Rule Making*, Gen. Docket No. 84-1234, 50 Fed. Reg. 8149, 8154 n. 44 (1985).

[42] *Notice of Proposed Rule Making*, *supra*, at para. 19.

[43] *Notice of Proposed Rule Making*, 50 Fed. Reg. at 8151.

[44] Other commenters, for example NTIA, understood our view of the scope of AMSS(R). As one of its plans for the reallocation of the L-band, it proposed that 10 MHz of AMSS(R) spectrum be set aside on a primary basis for the provision of ATC functions. The ATC functions that NTIA described did not include aeronautical passenger communications. *See Report and Order*, 2 FCC Rcd 1825, 1844 (1986). We ultimately adopted this proposal in our *Report and Order*.

[45] *See Report and Order*, 2 FCC Rcd at 1844.

[46] To the extent that the Aviation Parties suggest that our determination regarding the scope of AMSS(R) violates *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), we find that this argument is meritless for the reasons set forth note 65, *infra*.

[47] Section 4 also was amended by the 1987 Mobile WARC to include AMSS(R) as well as AMS(R). Because of the similarities between AMS(R) amd AMSS(R), we assumed prior to the amendment that the prohibition was applicable to both AMS(R) and AMSS(R). Again the 1987 Mobile WARC modifications confirm our interpretation of the effect of the "(R)" restriction on AMSS(R).

[48] Footnote 729A provides:

> Notwithstanding any other provisions of the *Radio Regulations* relating to restrictions in the use of the bands allocated to the aeronautical mobile-satellite (R) service for public correspondence, the bands 1545-1555 and 1646.5-1656.5 MHz may be authorized by administrations for public correspondence with aircraft earth stations. Such communications must cease immediately, if necessary, to permit transmission of messages with priority 1 to 6 in Article 51.

[49] *See Report and Order*, 2 FCC Rcd at 1844; *Reconsideration Order*, 2 FCC Rcd at 6836.

[50] There is also a limited air-to-ground radio telephone service under Part 22 of our Rules. *See* 47 C.F.R. Section 22.521.

[51] *See Notice of Proposed Rule Making*, Gen. Docket No. 88-96, 3 FCC Rcd 2436 (1988).

[52] *See Notice of Proposed Rule Making*, Gen. Docket No. 88-96, 3 FCC Rcd 2438 (1988).

[53] The petitioners specifically refer to the statements pertaining to US 308 at paragraph 54 of the *Reconsideration Order*: "It was not our intent to require an existing mobile satellite system to, in effect, surrender use of the 18 MHz of co-primary spectrum in the event that a subsequent AMSS(R) system is put into operation . . . . In order to protect the investment of the MSS licensee, we believe that AMSS(R) communications, beyond the 10 MHz primary allocation that is available, should appropriately be accommodated by real-time preemptive access of the MSS system in the shared 18 MHz." The Aviation Parties maintain that based on these statements and the revision to US308, aviation would be prohibited from ever providing service in the 18 MHz of co-primary spectrum.

[54] The Aviation Parties refer to *South Terminal Corp. v. EPA*, 504 F.2d 646, 656 (1st Cir. 1974)(final rule must be "in character with the original scheme" announced in the Notice); and *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022-23 (2d Cir. 1986). Additionally, they contend that the revised footnote is not a "logical outgrowth" of the first version adopted.

[55] The Aviation Parties further assert that the allocation scheme established in Footnote US308 is inconsistent with a letter, dated March 25, 1985, that the then Chief Scientist, Dr. Powers, wrote them. That letter, they maintain, indicated that aeronautical services had not been "cut off" by the MSS final filing date. The Aviation Parties argue that because Dr. Powers promised a separate allocation for AMSS(R) and stated that applications for the AMSS(R) service had not been cut off, the Commission cannot now use this proceeding to effectuate just such a result.

[56] *See Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

[57] The Aviation Parties refer to *Ridge Radio Corporation v. FCC*, 292 F.2d 770, 773 (D.C. Cir. 1961) as stating that a public notice of a cut-off date must "fairly advise prospective applicants of what is being cut off by the notice." On March 15, 1985, the Commission released a public notice stating that all L-band mobile-satellite applications must be filed by March 29, 1985.

[58] Volna is a mobile-satellite system that is being developed by the Soviet Union.

[59] The International Maritime Satellite Organization (INMARSAT) currently provides maritime satellite services to over 5000 ships and offshore facilities throughout the world

from three operational and three in-orbit spare satellites to serve the Atlantic, Pacific, and Indian Ocean regions. INMARSAT is planning to replace this first generation system with a second generation of satellites that will have triple the capacity of the currently leased satellites. The second generation system occupies 1530-1548 MHz/1626.5-1649.5 MHz. In our domestic allocation this includes 6 MHz at L-band where AMSS(R) is primary and MSS is secondary (1545-1548 and 1646.5-1649.5 MHz).

[60] The Aviation Parties reiterate earlier arguments that the Commission cannot implement this allocation because it has yet to develop specific technical requirements for interoperability. These arguments were addressed in the *Reconsideration Order* and are dismissed as repetitive. *See Reconsideration Order, supra,* n. 54.

[61] *See Notice*, Gen. Docket No. 84-1234, *supra*, at n. 44.

[62] *See Notice*, Gen. Docket No. 84-1234, *supra*, at paras 18-20.

[63] We agree with the Aviation Parties that our use of the term "co-primary" represents a modification of our usual use of that term. Services in a co-primary allocation have equal rights, pursuant to 47 CFR Section 2.104 (d). In this case, both services have equal rights for interference protection in the co-primary band segment. However, under Footnote US308 MSS must yield access to the spectrum on an as-needed basis to AMSS(R). Footnote US308 was adopted to regulate an AMSS(R) system's access to this band in order to ensure the viability of the MSS. So long as adequate notice and comment have been provided for, however, we may define "co-primary" any way that serves our purposes. As discussed herein, adequate notice and an opportunity for comment were provided with respect to this footnote.

[64] *See Reconsideration Order*, 2 FCC Rcd at 6838.

[65] *Ashbacker* merely requires that the Commission accord *bona fide* competing applications a full hearing by comparative consideration. The Aviation Parties also apparently read *Ashbacker* as requiring the Commission to reopen cut-off periods for spectrum whenever it modifies the rules governing that spectrum so as to enhance in any way the rights of any applicants who may have applied to use the spectrum. While the Aviation Parties have cited no authority to support this position, we note that the *Notice* expressly stated that the MSS licensee would be permitted to provide ATC services, which are also the principle services offered by AMSS(R). Thus, to the extent we ultimately determined that the MSS licensee should carry any excess AMSS(R) traffic that was shifted from the primary AMSS(R) bands to the co-primary bands, we think potential applicants had adequate notice before being cut off that the MSS licensees would be able to provide some AMSS(R) services. We note, however, that consistent with Dr. Power's March 25, 1985 letter our resolution of the sharing issue in the co-primary bands through footnote U.S. 308 did not effect the potential for an AMSS(R) applicant to provide AMSS(R) services in the 10 MHz of spectrum that we allocated primarily or exclusively for AMSS(R).

[66] *See Notice*, Gen. Docket No. 84-1234, *supra*, at para. 19.

[67] In addition, the Commission's determination that AMSS(R) does not include APC did not violate the Aviation Parties' *Ashbacker rights*. Implicit in this argument is an assumption that rights were compromised because the Aviation Parties might have filed an MSS application before the cut-off date if they had been aware of the limited nature of the separate AMSS(R) service. Apart from the fact that the Aviation Parties have never indicated that they have any interest for joining the Consortium to provide MSS service. Commission determinations concerning the permissible scope of other services that were not cut off, even if made subsequent to the MSS cut-off date, would not have compromised the *Ashbacker* rights of potential MSS applicants. In any event, the Commission did not redefine the scope of AMSS(R) to exclude APC after the cut-off date for the filing of MSS applications. As discussed previously, parties had notice that APC was prohibited in the AMSS(R) from the outset of these proceedings and before the cut-off date.

[68] *See* Aviation Parties' *Reply* at n. 30.

[69] *See United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (upholding dismissal of pending application on grounds that it violated new multiple ownership rules).

[70] The International Civil Avionics Organization is currently developing standards for aeronautical mobile-satellite systems. We anticipate that this activity will result in standards that are recognized internationally. It appears that adequate flexibility can be provided in the U.S. MSS system space segment to accommodate whatever aeronautical standards are ultimately adopted. *See* MSS Licensing Order, General Docket No. 84-1234, FCC 89-183 (adopted May 31, 1989).

[71] *See id* at para. 94. The specified hand-off arrangement for non AMSS(R) aeronautical traffic can be developed by our licensees and their prospective customers.

[72] The Commission has proposed an allocation in the 900 MHz region for terrestrial air-ground service. *See Notice of Proposed Rule Making*, Gen. Docket No. 88-96, 3 FCC Rcd 2436 (1988).

[73] On September 13, 1988, Arinc and the Air Transport Association of America filed with the Commission a Motion to Accept their Petition to Deny the Joint Amendment filed in the licensing proceeding. Since the issues raised in that document are handled in a separate proceeding, we will not address those points in this docket.

[74] Aeronautical Radio, Inc. (Arinc) and the Air Transport Association of America (ATA) filed this motion for the Commission to consider late comments. We have reviewed the comments presented and find that they largely relate to another proceeding, CC Docket No. 87-75. With the exception of the question of the feasibility of coordination as discussed in note 23 *supra*, we find that no new issues were raised that in any way pertain to General Docket No. 84-1234.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 84-1234

In the Matter of

Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services

In the Matter of the Applications of

GLOBAL LAND MOBILE SATELLITE, INC.	File Nos. 1625-DSS-P/L-85 1626-DSS-P/L-85
GLOBESAT EXPRESS	File Nos. 1627-DSS-P/L-(50)-85 1628-DSS-P-(5)-85
HUGHES COMMUNICATIONS MOBILE SATELLITE, INC.	File No. 1629-DSS-P/L-85
MCCA AMERICAN SATELLITE SERVICE CORPORATION	File Nos. 1630-DSS-P/L-85 1631-DSS-P-85
McCaw SPACE TECHNOLOGIES, INC.	File No. 1632-DSS-P/L-85
MOBILE SATELLITE CORPORATION	File Nos. 1633-DSS-P/L-85 1634-DSS-P/L-85 1635-DSS-P/L-85
MOBILE SATELLITE SERVICE, INC.	File Nos. 1636-DSS-P/L-85 1637-DSS-P/L-85 1638-DSS-P-85
NORTH AMERICAN MOBILE SATELLITE, INC.	File Nos. 1639-DSS-P/LA-85 1640-DSS-P-85
SATELLITE MOBILE TELEPHONE CO.	File Nos. 1646-DSS-P/L-85 1647-DSS-P/L-85
SKYLINK CORPORATION	File Nos. 1648-DSS-P/L-85 1649-DSS-P/L-85
WISMER & BECKER/TRANSIT COMMUNICATIONS, INC.	File Nos. 1650-DSS-P/L-85 1651-DSS-P/L-85 1652-DSS-P-85

MEMORANDUM OPINION AND ORDER

Adopted: May 31, 1989; Released: August 4, 1989

By the Commission:

1. By adoption of a *Second Report and Order* [1] in this proceeding, the Commission established licensing policies and procedures, as well as technical and regulatory policies, for a mobile satellite service (MSS).[2] The Commission also directed the twelve applicants who had filed applications for MSS systems[3] to amend their applications to comply with the adopted policies. Two parties[4] have petitioned for reconsideration of the *Second Report and Order*.

2. The Common Carrier Bureau subsequently issued a *Declaratory Order* [5] which concluded that other types of financial instruments were acceptable to demonstrate compliance with the financial qualification requirement established by the *Second Report and Order*. One MSS applicant, Globesat, has petitioned for reconsideration of the *Declaratory Order*, and one MSS applicant, MSSI, has applied for review of that decision.

3. The Common Carrier Bureau also issued an order on August 13, 1987 directing the pending MSS applicants to demonstrate strict compliance with the financial qualification requirement.[6] One applicant, MSSI, has petitioned for reconsideration of the *August 13th Order;* two applicants, Global and Globesat, have applied for review of that order.

4. Finally, the Common Carrier Bureau dismissed the applications of three parties -- Global, Globesat and MSSI -- for failure to comply with the Commission's and Bureau's orders to demonstrate compliance with the financial qualification requirement.[7] MSSI has petitioned for reconsideration of that action; Global and Globesat have applied for review of our decision.

5. As discussed below, we affirm the conclusions reached in each of these four orders.

I. BACKGROUND

6. On January 28, 1985, the Commission issued a *Notice of Proposed Rule Making* (*Notice*) [8] to allocate spectrum for MSS and to establish licensing procedures and regulatory and technical policies for MSS. The *Notice* also invited applications to construct, launch and operate MSS systems. The Commission stated that having defined MSS proposals would better enable it to develop policies for MSS. The *Notice* sought comments on whether only one MSS license should be granted and whether a multiparticipant, or consortium, ownership structure should be used to license a single MSS operator. Numerous comments were filed addressing the various issues raised by the *Notice*. In addition, twelve applications were filed for MSS systems, and numerous comments on those applications also were filed.

7. In July 1986, the Commission allocated 27 MHz of spectrum in the L-band for MSS,[9] to be shared with the aeronautical mobile-satellite service (AMSS(R)).[10] The

1549.5-1558.5 and 1651-1660 MHz bands were allocated on a co-primary basis to MSS and AMSS(R), with AMSS(R) having priority access in accordance with a new Footnote US308 to the Table of Frequency Allocations in Section 2.106 of the Commission's Rules, 47 C.F.R. § 2.106. The 1545-1549.5 and 1646.5-1651 MHz bands were allocated to MSS on a secondary basis with AMSS(R) primary in these bands. The L-band allocation for MSS was affirmed on reconsideration with a minor modification to clarify the footnote.[11]

8. Based on the twelve MSS applications and related comments that were filed, the Commission adopted the *Second Report and Order*. The Commission reached the following conclusions:

(a) only one MSS system would be licensed for the first generation to use the entire allocated bandwidth, both co-primary and secondary segments;

(b) the MSS license would be granted to a consortium comprised of all qualified applicants;

(c) each applicant would demonstrate its financial qualifications by making a $5 million cash contribution into the consortium;

(d) the MSS space segment licensee would be regulated as a non-dominant common carrier subject to streamlined tariff filings and facilities authorization procedures;

(e) the ground segment would be operated by multiple independent licensees that the Commission will forbear from regulating;

(f) state regulation of technical standards, entry and rate regulation of the space segment was preempted.

9. The Commission also adopted guidelines for the formation of the MSS consortium and implementation of the MSS system. We ordered a two-step process to implement our decision that the consortium should be formed only by willing and qualified applicants. Applicants were ordered to demonstrate their financial qualifications and their willingness to participate in a consortium by putting their $5 million cash contribution into an escrow account by April 13, 1987. These qualified applicants would comprise the consortium. After that step was completed, the applicants as a group would develop the consortium's structure, with ownership interests proportional to each participant's contribution, and would develop a technical proposal for a MSS system. The Commission ordered the applicants to submit the joint ownership agreement and technical proposal by July 27, 1987 as joint amendments to their pending individual applications.[12] Finally, the Commission ordered that any applicant not making an initial contribution to the consortium by the required date would have its application denied for noncompliance with the Commission's policies.[13]

10. Mobilesat petitioned for a declaratory ruling on, and TCI requested clarification of, the escrow account requirement established by the *Second Report and Order*. In particular, these applicants questioned whether other financial instruments could be used as alternatives for cash and whether loans could be used to raise the required $5 million contribution.

11. In the *Declaratory Order*, the Common Carrier Bureau noted that the Commission, in choosing a cash contribution to the consortium as the financial qualification requirement, had selected an unencumbered asset that was not based on contingencies or other financing schemes and that would be immediately available to be transferred to the consortium upon an applicant's decision to participate. The Bureau determined that, as this purpose could also be met by unconditional letters of credit and performance bonds, the applicants could submit these as alternatives to depositing $5 million in cash in an escrow account by the required date. The Bureau also ordered each applicant to file documentation of its $5 million and to certify that the sum was immediately available, was under its sole control, and could be freely transferred by the applicant to the consortium upon the applicant's decision to join.[14]

12. All of the then-pending applicants provided notifications by April 13, 1987 that purportedly complied with the Commission's financial requirements. Four claimed that they had deposited $5 million into escrow accounts; seven claimed that they had obtained unconditional letters of credit. However, some of the applicants filed pleadings that questioned the notifications filed by others in the group.[15] After an initial review of the applicant's notifications, the Bureau requested three applicants -- Hughes, MSSI and Globesat -- to provide additional documentation to verify their claims. They complied with this request. However, applicants continued to question each other's financial qualifications. Just prior to the July 27th deadline for filing the joint amendments, five applicants filed a request for expedited declaratory ruling on each applicant's financial qualifications, claiming that lingering questions about financial qualifications were impeding the process of forming the consortium.[16] The Bureau deferred acting on this request pending the filing of the amendments.

13. On July 27, 1987, two separate MSS proposals were filed. One was jointly filed by a group of eight applicants; the other by a group of two. Although it did not waive its right to join a consortium, one applicant chose not to participate in either group and requested the Commission to become involved in the process.

14. In the *August 13th Order*, the Bureau dismissed both proposals, noting that in the *Second Report and Order* the Commission contemplated only one jointly amended MSS application. Because the applicants indicated that they believed a full settlement was still possible, the Bureau extended the time to file the joint amendments.[17] The Bureau also recognized that some applicants had alleged that questions about financial qualifications, based on the April 13th filings, had impaired the settlement process. In order to resolve this issue expeditously, the Bureau decided to enforce strictly the procedure enunciated in the *Second Report and Order* and ordered each applicant to make its initial $5 million cash contribution into the consortium. Specifically, the applicants were ordered to put their cash contributions into a central escrow account to be determined by a majority of the group no later than August 21, 1987.[18] The Bureau stated that those not electing to continue participating must be permitted to withdraw their contribution with interest, if appropriate. The Bureau also ordered that the application of any applicant not making the escrow deposit by the required date would be dismissed for noncompliance with the Commission's orders.[19]

15. On August 21, 1987, eight applicants[20] each deposited $5 million cash into a central escrow account. The three remaining applicants -- Global, Globesat and MSSI-- did not contribute to this account. Instead, Globesat, which had sought an extension of the August 21 deadline, sought reconsideration of the Bureau's denial of its request. MSSI filed a letter stating that it did not agree with the terms of the escrow account and thus did not make the deposit.

16. On September 4, 1987, the Bureau dismissed the applications of Global, Globesat and MSSI. In its *Dismissal Order*, the Bureau noted that the Commission and the Bureau had repeatedly stated that failure to demonstrate financial ability by making a $5 million cash contribution into the consortium would result in dismissal. Because Global, Globesat, and MSSI did not comply with the *Second Report and Order* and subsequent orders, the Bureau dismissed their pending MSS applications.[21] The applicants have requested reconsideration and review of this decision.

II. SECOND REPORT AND ORDER

17. Global, an original MSS applicant, and the Aviation Parties request reconsideration of the MSS licensing policies that were established in the *Second Report and Order*. Five of the MSS applicants -- Hughes, McCaw, Skylink, MCCA, and Omninet -- jointly oppose Global's petition for reconsideration, while eight of the MSS applicants -- the five listed above as well as Global, Mobilesat, and Globesat -- oppose the Aviation Parties' petition.[22] Both Global and the Aviation Parties submitted a reply.

18. Global contends that the *Notice* in this proceeding failed to provide interested parties with adequate notice concerning the ownership structure and the financial qualifications requirements that were ultimately adopted. In particular, Global contends that the *Notice* suggested that a voluntary, rather than a mandatory, consortium structure might be adopted. More importantly, according to Global, the *Notice* failed to indicate that the applications of those who failed to join the consortium would be dismissed. As Global understood the *Notice*, the Commission proposed to select one of the competing applicants based on the applicant's proposal for a joint ownership structure. The consortium would then be formed through implementation of the selected applicant's ownership plan. Similarly, Global believes that the *Notice* did not provide adequate notice that consortium members would be required to contribute $5 million in cash into an escrow account. The MSS applicants jointly opposing Global's petition claim that the *Notice* did provide adequate notice and an opportunity to comment on these issues.

19. We conclude that the *Notice* sufficiently notified interested parties that we might impose the challenged requirements. The Administrative Procedure Act requires that agencies "fairly apprise interested persons of the subjects and issues [of the rule making]."[23] Nevertheless, agencies are permitted to adopt rules that differ somewhat from their proposals so long as the final rules are a "logical outgrowth" of the proceedings.[24]

20. We first reject Global's claim that interested parties were not afforded adequate notice that we might require the formation of a mandatory consortium, comprised of all qualified applicants, for the provision of MSS service. We expressly requested comment on the desirability of the consortium approach for MSS and whether the consortium should be mandatory.[25] Further, our MSS proposal was based in part on two applications for developmental licenses filed by Skylink and Mobilesat, which had proposed that a multiownership entity be licensed as the sole MSS operator. We endorsed these suggestions and proposed to license one entity based on a multiownership arrangement.[26] To demonstrate the viability of the proposed consortium approach, we also described prior instances wherein the Commission had approved joint ownership ventures composed of a single service provider or licensee.[27] Finally, the *Notice* described Mobilesat's reasoning that a joint venture of all interested and qualified parties would avoid a comparative hearing process.[28] Thus, the *Notice* gave explicit notice that any applicant who declined to join the consortium would not be entitled to comparative consideration.

21. Global points to other passages in the *Notice* in which we recognized that it might be difficult to achieve agreement between the various parties who would comprise an MSS consortium,[29] and in which we proposed comparative criteria for selecting among the various applicants.[30] Based on these passages, Global argues that we intended the consortium approach to be voluntary. While a voluntary consortium was one approach under consideration, it was not, however, the only proposal set forth in the *Notice*.[31] As demonstrated above, we also expressly asked for comment on whether we should mandate that only one entity, a consortium, be eligible for the license.

22. The *Notice* also adequately apprised interested parties that even if a consortium were adopted, financial qualifications might be imposed. We proposed that each applicant be required to demonstrate its financial ability to meet the costs of constructing, launching, and operating its proposed MSS system for one year.[32] The *Notice* expressly warned that those submitting applications would be required to meet this requirement or their applications would be returned as defective.[33] In the section of the *Notice* setting forth the proposed financial standard, applicants were explicitly asked to set forth the "ownership or participation proposal" that would be used in making the requisite financial showing if a single joint entity were authorized.[34] Applicants, therefore, had ample notice that if a consortium approach was adopted, they would be subject to the proposed financial criteria, and they also were asked to comment on the means of structuring the ownership of such a cooperative proposal. In light of the foregoing, we think all commenters had clear notice that they should address issues surrounding the proposed financial showing and how it should be applied in a consortium arrangement.

23. In the *Reportand Order*, we eventually decided not to adopt the financial requirement proposed in the *Notice*. However, we think that the modified financial standard ultimately adopted was a logical outgrowth of the financial issues raised by the *Notice*. To discourage speculative applications and to encourage expeditious implementation of the new service, the *Report and Order* adopted the *Notice*'s proposal that only applicants meeting the financial requirements would be eligible to join the consortium; other applicants would be dismissed. However, we relaxed the financial standard somewhat for the consortium arrangement by not requiring that the consortium demonstrate its ability to meet the costs of constructing, launching and operating its proposed satellite system for one year. Because all parties were clearly on notice that failure to meet our financial requirements might result in

dismissal of their applications and because they were expressly asked to comment on application of the proposed financial standard in a consortium setting, we think that all parties had adequate notice and an opportunity to comment on these issues. Accordingly, we think no party was harmed because we decided to adopt a somewhat less stringent financial standard than that originally proposed.[35]

24. Global next contends that the Commission lacks the authority under the Communications Act to dismiss the applications of those who fail to join the consortium.[36] Global contends that if an applicant chooses not to join the consortium, it is entitled under section 309(e) of the Communications Act to comparative consideration of its application with any other MSS application. In their Joint Opposition to Global's petition, the five MSS applicants maintain that the requirement that all applicants join the consortium does not contravene section 309(e).

25. We reject Global's claim that we are required to hold hearings on applications that do not comport with our decision in this proceeding to authorize the provision of MSS only through a consortium. The legal issues raised by Global are essentially identical to those addressed by the Commission previously in the *Alaska Bush Earth Station* proceeding.[37] In that proceeding and in this one, we chose to proceed through our Rule Making authority rather than through adjudication. The hearing requirement in section 309(e) of the Communications Act, which was addressed in the *Ashbacker* decision, does not preclude this procedure. Section 309(e) and *Ashbacker* only require a hearing when there are before us *bona fide* mutually exclusive applications that comply with our rules.[38] Global's initial MSS application does not comply with our generic policy decision in this Rule Making that MSS may be provided only by a consortium comprised of all qualified applicants. Having resolved that policy issue in the Rule Making, we need not hold further hearings on that question when considering Global's application. Similarly, to the extent that an applicant patently fails to meet our financial requirement, no hearing is required before dismissing the application on those grounds.[39]

26. Finally, Global generally argues that the Commission lacks statutory authority to require the MSS applicants to place $5 million cash into an escrow account. Global asserts that Commission has no right to review the individual applicant's financial qualifications. Global reasons that if the individual applicants join the consortium, the consortium becomes the applicant, and the Commission therefore has no authority to examine the financial qualifications of the consortium's partners because they are no longer individual applicants. Global also contends that the Commission's financial requirement lacks a rational basis and that the $5 million cash escrow deposit is arbitrary and capricious. It questions the Commission's determination that preoperational expenses, rather than construction and operating costs, provide a valid basis for deciding that $5 million should be the minimum contribution of each applicant. Additionally, Global notes that even if each applicant provides $5 million, the consortium would still not have anywhere near the estimated $400 million required to implement a MSS system. Thus, in Global's eyes, the $5 million contribution per applicant represents an unreasonable standard against which to measure an applicant's financial qualifications. With respect to this whole process, Global argues that an applicant's financial qualifications can hardly be ascertained if, through the control it is permitted to retain over its escrow deposit, it may simply withdraw its funds from escrow after agreeing to join the consortium.

27. The MSS applicants disagree. They note that existing law provides that so long as the agency's reasoning can be reasonably discerned its decisions may not be found to be arbitrary and capricious. The MSS applicants argue that the Commission had the requisite authority under section 308(b) of the Communications Act and that it was reasonable to utilize that authority to ensure that the consortium received adequate start-up capital to ensure its viability. They also observe that $5 million dollars per applicant, while hardly sufficient to provide the $400 million that may be required to implement a system, strikes a reasonable balance that will ensure that the consortium has adequate capital initially and that only financially qualified applicants may participate, while enabling the kind of broad participation of applicants that a higher amount might preclude.

28. There appears to us to be little doubt that the challenged financial showing is permitted under our enabling statute. The Communications Act provides that the Commission may prescribe the financial, technical, and other qualifications of applicants to operate proposed facilities. *See* 47 U.S.C. § 308(b). We find no merit in Global's contention that as the MSS licensee will be the consortium, and not the individual MSS applicants, the Act permits us to consider only the consortium's financial qualifications. At the time the financial showings were required, the individual applications of each MSS applicant were, and indeed still are, on file; we continue to consider each of them to be the applicants, not the consortium. For example, we directed the applicants individually to satisfy the financial requirement and to file a joint ownership agreement as a joint amendment to the pending individual applications, rather than dismiss those applications in favor of a new consortium application. While the consortium ultimately becomes the licensee, it is to the various MSS applicants, who constitute the consortium, that we must look for its financing. As the consortium merely constitutes the vehicle through which each applicant is provided an opportunity to be involved in MSS, it is reasonable for us to expect the individual parties to demonstrate adequate financing.

29. Further, the financial criterion adopted was a reasonable one. In many of the services authorized by the Commission, applicants must demonstrate their financial ability to implement the proposed facilities. A financial requirement is in the public interest when, as is the case here, the Commission is authorizing a new service and does not want the implementation of service to the public unduly delayed.[40] Financial qualification requirements also may be designed to deter speculative applications by underfinanced entities that have no real interest in operating radio facilities but are seeking to profit from obtaining a license.[41] In all of the satellite services authorized by the Commission, an applicant's financial qualifications to be a licensee are evaluated. The evaluative standards used, however, are not the same in all of the satellite services because the standards generally have been formulated to reflect the special characteristics of the particular service. The general principle underlying the different financial standards is the same – *i.e.*, scarce orbit-spectrum resources should not lie fallow and the implementation of service to the public should not be delayed because of an applicant's financial inability to construct, launch and

operate the authorized satellite systems in a timely manner.[42] Given the large investment costs in constructing and operating satellite systems, we have generally sought to deter speculative applications when developing financial standards for satellite service applicants.[43]

30. In determining that the MSS licensee should be a consortium comprised of all qualified applicants, we ultimately chose a financial qualification standard less onerous than the proposed standard that each applicant demonstrate the ability to meet all costs to construct, launch and operate the system for one year. For the multiownership approach, the financial qualification criteria adopted was "an initial $5 million cash contribution into the consortium."[44] The five million dollars was arrived at after considering the estimated costs of a completed MSS system ($400 million) and the preoperational expenses ($20 million)[45] that would have to be shared by each applicant, and the minimum number of applicants (four) we expected to join the consortium. Five million dollars per applicant appeared the minimum amount needed to get the venture under way, based on this scenario. We noted that if more than four applicants chose to join the consortium, the additional contributions could be used to cover the approximately $400 million that the system would ultimately require.[46] We also commented:

> Once the initial contribution is made and the members of the consortium determined, additional contributions may be made by the participants and ownership interests adjusted to reflect these contributions. We believe that through these initial contributions and the presence of financially able participants, complete financing will be able to be arranged soon after grant.[47]

31. The requirement that each applicant make a $5 million cash contribution into the consortium reflects a reasonable balancing of competing interests: namely, to ensure adequate funding for the system and to discourage speculative applications without precluding the involvement of new or small businesses. As we noted in the *Second Report and Order*, this financial standard would ensure each applicant's ability to contribute financially to the project and would discourage speculative applications. At the same time, the applicants' initial contribution would provide an adequate capitalization base with which the consortium could attract additional financing to ensure full funding of the system.[48]

32. It also should be noted that, in at least one other instance involving a consortium, we have required a minimum monetary contribution to establish financial qualifications based on similar factors.[49] We conclude that our decision here was a reasonable one, based on an examination of pertinent information and designed to achieve specific goals. Specifically, we think the proposed financing scheme will be fully adequate to ensure that the consortium is able to arrange the additional financing that it requires to fully implement the system.[50]

33. In their petition for reconsideration, the Aviation Parties[51] argue that MSS should not be a monopoly service. They allege that there is little demand for the service and argue that a monopoly authorization is inconsistent with the Commission's pro-competitive policies.[52] Further, they believe that even if there are short-term benefits to having a monopoly MSS licensee, the Commission should preserve the opportunity to license multiple MSS systems in the future. In a joint opposition, seven MSS applicants argue that the Commission's decision to have a single MSS system was reasonable in light of the economic demands of developing and implementing an MSS system and the technical constraints of the limited spectrum available. They also observe that because some of the services the MSS system will offer will be similar to other authorized services, such as cellular radio, competition will exist. In addition, they contend that the Commission's MSS decision is pro-competitive both in allowing all qualified MSS applicants to participate in the space segment ownership structure and in adopting common carrier regulation with open access to both the space and ground segments. Globesat also filed an opposition that supports the Aviation Parties' position that there could be multiple MSS licensees.[53]

34. We continue to believe that multiple MSS systems are infeasible at this time in the 1545-1558.5/1646.5-1660 MHz bands. In our *Notice*, we stated that due to technical and economic constraints, it was likely that only one entity could be authorized to operate on these frequencies allocated for MSS for the first generation.[54] We adopted this policy in the *Second Report and Order*, in which we concluded that: (a) the available technology does not make it feasible at this time for two or more MSS systems to operate on the same frequency; (b) given the high cost of an MSS system and the limited amount of frequency allocated, multiple systems on discrete frequency segments would not likely be economically viable; and (c) coordination with and priority access for AMSS(R) would be facilitated with only one MSS system in the band.[55] The *Second Report and Order*, as well as the *Notice*, also indicated that in the 1545-1558.5/1646.5-1660 MHz bands international coordination and cooperation would be facilitated with only one MSS system.[56] No party has presented evidence that these conclusions are in error. The Aviation Parties also object to the single licensee concept on the ground that it is anticompetitive. We generally seek to promote competition by authorizing multiple service providers. In light of the unique factors just discussed, authorizing more than one MSS system in these bands at this time would jeopardize the implementation and viability of MSS. We chose, therefore, to encourage competition by adopting open access policies for an MSS system, whereby one initial MSS system would be accessed by independent entities which would offer services to end users on a competitive basis. In addition, the space segment licensee would be regulated as a common carrier with an obligation to serve the public at reasonable rates on a non-discriminatory basis.[57] We believe this approach balances the goals of competition and efficient spectrum use in a way best designed to serve the public interest.[58]

35. The Aviation Parties also request clarification with respect to whether a separate AMSS(R) system would be foreclosed in the L-band if an MSS system were licensed in the same frequency band.[59] The Aviation Parties apparently fear that we may construe our prior decisions in this Rule Making proceeding as permitting the MSS licensee to offer both AMSS(R) and MSS services, rather than providing for separate AMSS(R) and MSS systems. The MSS applicants disagree with the Aviation Parties and maintain that as a result of this rule making, the Commission could determine that AMSS(R) and MSS services may be offered by a single MSS entity. Globesat agrees

with the other MSS applicants on this issue. In reply, the Aviation Parties argue that in light of the MSS applicants response, the need for clarification is even greater.

36. In the *Allocation Reconsideration Order*, we concluded that our allocation did not preclude a separate AMSS(R) system in the lower band where AMSS(R) is primary, but declined to discuss specifics concerning such a system, pending future developments.[60] Any MSS system licensed for the L-band would have to conform its use to the allocation requirements for using that band. Those requirements provide that AMSS(R) is primary and MSS is secondary in the lower segment of the band and that AMSS(R) has priority and real-time preemptive access in the co-primary band when demand justifies the need for using additional spectrum. Thus, licensing an MSS system to operate in the whole band would not necessarily foreclose a separate AMSS(R) system in the lower band where AMSS(R) is primary.[61] In light of the foregoing, we do not believe further clarification is necessary.

III. DECLARATORY ORDER

37. Globesat challenges the Bureau's *Declaratory Order* on the grounds that it imposes more stringent financial qualification criteria than those prescribed in the *Second Report and Order* without appropriate notice and an opportunity to comment. Globesat claims that in the *Second Report and Order*, we required applicants to show only the "ability and willingness to help finance the system from the outset," whereas in the *Declaratory Order* the Bureau imposed the additional requirement that only unconditional letters of credit or performance bonds and cash would be acceptable means of satisfying the financial standard.[62] MSSI, on the other hand, believes that the options of submitting letters of credit or performance bonds in lieu of cash relaxed the Commission's financial qualification criteria of cash only. However, MSSI contends that the *Declaratory Order* imposed new requirements to the extent it required the applicant to certify that the financing available under those instruments was non-contingent.[63]

38. As discussed above in paragraphs 30 and 31 the financial qualifications requirement adopted in the *Second Report and Order* was that each applicant make a $5 million cash contribution into the consortium.[64] The financial standard was not a mere showing of ability and willingness to contribute as Globesat claims. Thus, to the extent Global believes the *Declaratory Order* imposed more onerous requirements by permitting applicants to rely on performance bonds and letters of credit, Globesat's argument is meritless.

39. The Bureau apparently determined that other financial instruments appeared to provide the same assurances as cash. In light of requests made by several applicants, the Bureau decided to permit those alternatives when applicants made their demonstration of financial ability by the April 13th deadline that the Commission imposed in the *Second Report and Order*. [65] In particular, the Bureau recognized that the Commission required cash demonstrations because cash is an unencumbered asset that should be immediately available to the applicant for transfer to the consortium upon the applicant's decision to join. The Bureau recognized that, under certain circumstances, unconditional letters of credit and performance bonds could provide the same assurance of immediate access. Nevertheless, in order to ensure that these alternate financial documents were equivalent to cash, the Bureau required that each applicant certify that the $5 million from the alternate source was under its sole control and could be freely transferred to the consortium upon the applicant's decision to join the consortium.[66]

40. MSSI raises several objections to the foregoing requirements imposed by the Bureau. However, it appears that these objections are now moot because, as discussed below, the Bureau subsequently determined that it should adhere strictly to the $5 million cash showing imposed in the *Second Report and Order*. Accordingly, the portion of MSSI's application for review objecting to the requirements of the *Declaratory Order* is dismissed as moot.

IV. AUGUST 13TH ORDER

41. The Bureau's *August 13th Order* dismissed the two MSS consortium proposals, [67] directed the applicants to submit a new unified consortium proposal by September 4, 1987,[68] and required each of the MSS applicants to deposit its $5 million cash contribution into a joint escrow account. MSSI, Globesat, and Global, either in petitions for reconsideration or applications for review, challenge the Bureau's decision in the *August 13th Order* to adhere to a strict interpretation of the Commission's financial qualification requirement as established in the *Second Report and Order*. Three MSS applicants - Mobilesat, NAMS, and TCI -- have filed a joint opposition to the applications for review.

42. As discussed above at paragraph 14, the Bureau decided to apply strictly the financial qualification requirement imposed by the Commission. As a consequence of the financial demonstrations permitted by the *Declaratory Order*, parties had raised numerous issues concerning the financial qualifications of various MSS applicants, including a motion for a declaratory ruling regarding each applicant's financial qualifications. Further, allegations were made that these issues were impairing the settlement process.[69] The Bureau believed that the failure to resolve these issues was impeding the process of reaching an agreement on a consortium.

43. Both Global and Globesat deny that questions of applicants' financial qualifications were impairing the settlement process. They maintain that the negotiation process was hampered by disputes over procurement policies and business strategy. Therefore, they contend that there was no reason for reverting to a strict application of the Commission's financial showing. The parties filing a joint opposition agree with the Bureau that adhering to the financial showing prescribed in the *Second Report and Order* would facilitate the settlement negotiations.[70]

44. We concur in the Bureau's decision and conclude that strict conformance to the requirements of the *Second Report and Order* was both proper and in the public interest. The various challenges and allegations, referred to above, concerning the applicants' financial qualifications appeared to be impeding an agreement among the applicants and this is substantiated by the applicants' failure to agree to an organizational structure by the established deadline.[71] Thus, the Bureau's *August 13th Order* appropriately recognized that in order for a settlement to be effectuated, any concerns regarding an applicant's financial qualifications had to be resolved before negotiations among the applicants could proceed.[72] The *August 13th Order* sought to bring these particular issues to a

speedy and certain resolution by ordering each applicant to demonstrate its financial qualifications through a cash contribution into a joint escrow account.[73]

45. MSSI and Globesat next contend that the Bureau misinterpreted the *Second Report and Order*. MSSI has petitioned for reconsideration on the grounds that requiring applicants to put their cash contribution into a central or joint escrow account prior to forming the consortium contradicts the *Second Report and Order*'s directive that consortium participation be based on an applicant's willingness and ability to help finance the system. MSSI claims that the applicants had already met this directive by either depositing $5 million cash in individual escrow accounts or by obtaining unconditional letters of credit or performance bonds by the April 13th deadline and that the monies were to be transferred into the consortium only after it was organized.[74] Globesat, on the other hand, contends that requiring applicants to place cash contributions into a central escrow account contradicts the *Second Report and Order*, particularly its directive that no one means (*e.g.*, a substantial investment in the space segment) should be the basis for participation in the consortium.[75]

46. We find that the Bureau's directive that applicants put their $5 million contributions into a joint escrow account was entirely consistent with the processing scheme established in the *Second Report and Order*. Based on the various comments received in this proceeding, the Commission determined that, as a matter of policy, only qualified applicants were to comprise the consortium. In order to ensure that applicants were financially qualified, we required that they demonstrate their financial ability to make a $5 million contribution to the consortium by depositing that sum in an escrow account.[76] We do not believe it should matter to the applicants, assuming each has the $5 million, whether the money is placed in a joint or an individual escrow account. To protect applicants who later chose not to participate in the consortium, we stated that the escrow agreement should permit such applicants to withdraw their contributions with interest.[77] Thus, applicants would not be harmed in complying with this order. Also, by establishing a joint escrow account subject to a negotiated agreement, the applicants would address each other directly regarding their financial ability to contribute to the consortium.[78]

47. Global again argues that this approach to determining the financial qualifications of the MSS applicants violates the Communications Act. In particular, it contends that if there are questions concerning a specific applicant's qualifications, those questions must be resolved in a hearing pursuant to section 309(e) of the Communications Act. As we previously stated in paragraph 25 above, section 309(e) does not require a hearing where an applicant patently fails to comply with our rules. In such cases, there is no substantial and material question of fact to be decided in a hearing. Indeed, one reason we established this procedure for demonstrating financial qualifications was to eliminate the need for time consuming hearings.[79]

48. Globesat and Global further contend that the *August 13th Order* did not provide sufficient time to allow them to deposit their funds into the joint escrow account. The joint opposition notes that the Bureau's directive was not overly burdensome and adds that all the other applicants were able to satisfy the requirement on time. We find Globesat's and Global's argument unpersuasive. Subsequent to the Bureau's *Declaratory Order*, all of the applicants were required to place $5 million into individual escrow accounts or obtain unconditional letters of credit, and all of the applicants alleged that they had done so. In view of the applicants' representations that they had satisfied this requirement, they should have had no trouble in quickly obtaining the $5 million cash to deposit in a joint account.[80] Accordingly, we consider the seven days that the Bureau afforded them to place their contributions into a joint escrow account to be sufficient.[81]

49. Finally, both Globesat and Global challenge the Commission's authority to invalidate the financial arrangements that some of the MSS applicants have reached among themselves. Global reads the *Declaratory Order* as merely requiring that the applicants produce, in lieu of cash, either the allowed letters of credit or performance bonds. Global asserts that nothing in the *Declaratory Order* indicates that the applicants would be expected to use the letters of credit or performance bonds if the members of the consortium agreed otherwise. Therefore, Global argues that it should have been permitted to negotiate with other applicants to contribute less than $5 million to the consortium and to assume a non-voting role.[82] Further, Globesat contends such an interpretation of the Commission's requirements is reasonable under the circumstances. According to Globesat, as negotiations among a majority of the applicants had resulted in an organizational structure in which enough voting partners would contribute $5 million each, the $20 million minimum capitalization the Commission considered to be necessary in the *Second Report and Order* would be raised and no additional contributions would be necessary. Globesat contends that requiring each applicant to contribute $5 million would be unreasonable as it would yield a $55 million initial capitalization, or $35 million more than the Commission considered necessary. The joint opposition claims that the *August 13th Order* merely implemented the financial requirements of the *Second Report and Order* and that those requirement may not be circumvented by agreement of the applicants.

50. We disagree with Global's and Globesat's arguments that some of the applicants did not have to make the $5 million cash contribution to the consortium if they had agreed to a smaller ownership share and non-voting status during settlement negotiations with a majority of the other applicants. The $5 million cash contribution into the consortium is the financial qualification requirement that all of the applicants must satisfy in order to participate in the consortium. No Commission or Bureau order made any provision permitting an agreement among the applicants that could change this basic qualifying requirement for MSS applicants. As we noted in the *Second Report and Order*, the only proportional ownership interests that may exist are those based on a participant's capital and non-capital contributions, if any, in excess of the initial $5 million.[83] Further, we never mandated a specific $20 million capitalization requirement for the consortium, as Global and Globesat allege, nor limited the applicants' cash contributions to a proportion of the pre-operational expenses. To the extent there were excess cash contributions, the Commission stated that those contributions would be used to finance further the system.[84] Accordingly, we reject any claim that the applicants were entitled to enter into arrangements that alter our financial requirement.

V. DISMISSAL ORDER

51. The Bureau dismissed the applications of MSSI, Globesat, and Global for failing to contribute their $5 million in cash to the joint escrow account as required by the Bureau's directive in the *August 13th Order*. MSSI has submitted a petition for reconsideration of the *Dismissal Order*. Global and Globesat have filed applications for review of the *Dismissal Order*. Mobilesat, NAMS, and TCI jointly opposed MSSI's petition for reconsideration and Globesat's application for review.

52. MSSI contends that the Bureau should not have dismissed the amendment filed by the partial settlement group to which it belonged. MSSI maintains that the Bureau should have used the partial settlement as a means of facilitating a full settlement among all of the applicants. The Commission has broad discretion to conduct its proceedings in such manner as it believes will be most conducive to the proper dispatch of its business. 47 U.S.C. § 154(j). When the MSS applicants formed three different factions and two of those groups filed their own amendments in response to the July 27th deadline, the Bureau decided to give the applicants one final opportunity to reach full settlement. Although the Bureau recognized that some progress had been made in the consolidation of the applicants into three groups, one of which contained a majority of the applicants, the Bureau also recognized that lingering concerns among the applicants regarding financial qualifications had to be resolved before negotiations could proceed. We find that the Bureau properly decided that the most expedient means of facilitating a full settlement among the applicants was to resolve first financial qualification issues by strictly implementing the financial showing prescribed in the *Second Report and Order*. Accordingly, we conclude that the Bureau's action was reasonable.

53. MSSI also claims that it properly refused to contribute to the joint escrow account because it did not agree with some of the terms in the escrow agreement. It notes that it sought an alternative means of protecting its interests within the consortium while also demonstrating its financial qualifications. MSSI contends that it satisfied the Commission's financial qualification requirement by submitting to the Commission a check for $5 million payable jointly to the "Federal Communications Commission and MSS Consortium." The joint opposition asserts that as eight other applicants fully complied with the directive of the *August 13th Order* in a timely manner, MSSI should have done so as well.

54. We find that MSSI failed to comply with our financial showing requirement and that its disagreement with the terms of the escrow account did not entitle it to ignore that requirement. As the Bureau noted in its *Dismissal Order*, MSSI could have joined with some of the other applicants in depositing their funds under protest.[85] Further, those applicants who disagreed with consortium management decisions and later chose not to participate were to be permitted to withdraw their contribution from the escrow account with interest. Thus, MSSI could have complied with our requirements and still have protected its interests. Finally, even if the "check" that we received was a negotiable instrument, the Commission was not required to deposit the funds into the consortium on MSSI's behalf. Only MSSI could take such an action and, thereby, comply with our financial requirements. MSSI also claims, as it has in other pleadings addressed in this order, that the central escrow account requirement of the *August 13th Order* contradicts the *Second Report and Order* because it requires each applicant to make its cash contribution prior to joining the consortium. We previously responded to this argument in paragraph 46 above.

55. As for Global, it again contends that the Commission has statutory authority to consider the financial qualifications only of the consortium itself and not of its individual members, the MSS applicants. As noted earlier (*see* paragraph 28, *supra)* this argument is without merit. Additionally, Global reiterates its challenges to the Commission's decision to adopt the $5 million financial contribution requirement. It contends that section 309(e) of the Communications Act and the Supreme Court's decision in *Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1945), require the Commission to hold a hearing before an application may be denied for lack of financial qualifications. Again, we have previously rejected this argument (*see* paragraph 25, *supra).*

56. Global also claims that it demonstrated in its original application how sufficient funds could be raised to construct and operate an MSS system and that the Commission has never challenged this showing. That financial showing was made prior to and was considered, along with the other applications, at the time the Commission promulgated the $5 million contribution requirement adopted in the *Second Report and Order*. Global was required to meet the adopted standard, absent a waiver, but it never sought to demonstrate why a waiver of the requirement would be warranted. Also, Global's argument that an applicant can rely on a consortium plan to raise funds in lieu of making a $5 million cash contribution is not persuasive. We have always recognized the consortium's need to raise additional funds. The $5 million cash contribution was to determine an applicant's qualifications at the outset and to deter speculative applicants.

57. Globesat further suggests that there was inadequate notice of the financial requirement that the Commission adopted in the *Second Report and Order*, that the Bureau's *August 13th Order* improperly changed its interpretation of the required financial showing by directing applicants to place their $5 million cash contributions into a central escrow account before the consortium was formed, and that Globesat was improperly denied the opportunity to enter into a settlement that permitted it to contribute a lesser amount than the other applicants. These arguments were previously rejected in paragraphs 22 and 23, 46, and 50, respectively, above.

58. Accordingly, we conclude that the Bureau properly dismissed the applications of MSSI, Global, and Globesat for failure to comply with the Commission's and Bureau's orders. These orders clearly provided that an applicant's failure to demonstrate financial ability by making a $5 million cash contribution into the consortium would result in dismissal. These three applicants failed to meet this requirement and dismissal was therefore proper.

VI. ORDERING CLAUSES

59. Accordingly, IT IS ORDERED that the petitions filed by Global and the Aviation Parties for reconsideration of the *Second Report and Order* in General Docket No. 84-1234 ARE DENIED.

60. IT IS FURTHER ORDERED that the petition for reconsideration filed by Globesat IS DENIED and the application for review filed by MSSI of the *Declaratory Order* in this proceeding IS DENIED IN PART and otherwise DISMISSED AS MOOT.

61. IT IS FURTHER ORDERED that the petition for reconsideration filed by MSSI and the application for review filed by Global and Globesat of the *August 13th Order* in this proceeding ARE DENIED.

62. IT IS FURTHER ORDERED that Global's application for review of the Common Carrier Bureau's letter response to Global's request for clarification of the *August 13th Order* IS DENIED.

63. IT IS FURTHER ORDERED that the petition for reconsideration filed by MSSI and the applications for review filed by Global and Globesat of the *Dismissal Order* in this proceeding ARE DENIED.

64. These actions are taken pursuant to sections 4(i), 303, 308, 309, and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303, 308, 309, and 405, and are effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Second Report and Order, General Docket No. 84-1234, 2 FCC Rcd 485 (1987).

[2] A mobile satellite service is a radiocommunication service between mobile earth stations and one or more space stations. *See* 47 C.F.R. § 2.1. Its purpose is similar to that of relay antenna towers in terrestrial mobile radio services, but because satellites are distance insensitive, it provides service without the population density or accessibility requirements characteristic of terrestrial services.

[3] Applications were filed by Global Land Mobile Satellite, Inc. (Global); Globesat Express (Globesat); Hughes Communications Mobile Satellite Services, Inc. (Hughes); MCCA American Satellite Service Corporation (MCCA); McCaw Space Technologies, Inc. (McCaw); Mobile Satellite Corporation (Mobilesat); Mobile Satellite Service, Inc. (MSSI); North American Mobile Satellite, Inc. (NAMS); Omninet Corporation (Omninet); Satellite Mobile Telephone Co. (SMTC); Skylink Corporation (Skylink); and Wismer & Becker/Transit Communications, Inc. (TCI). Omninet later withdrew its application.

[4] One petition was filed by Global, an MSS applicant. The other petition was filed jointly by Aeronautical Radio, Inc. (Arinc), Aircraft Owners and Pilots Association (AOPA), Air Line Pilots Association (ALPA), Air Transport Association of America (ATA), Experimental Aircraft Association (EAA), Helicopter Association International (HAI), National Air Transportation Association (NATA), and Regional Airline Association (RAA) (hereinafter "Aviation Parties").

[5] Declaratory Order, 2 FCC Rcd 2417 (1987).

[6] Order, 2 FCC Rcd 5647 (1987) (hereinafter "August 13th Order"). This order also denied a petition filed by Hughes to dismiss TCI's application for allegedly violating the cut-off rules. Hughes has filed a petition for reconsideration of that decision. Because the petition raises issues regarding grant of TCI's application, we will address Hughes' petition when we act on the pending MSS applications.

[7] *See* Global Land Mobile Satellite, Inc., *et al.*, 2 FCC Rcd 5552 (1987) (hereinafter "Dismissal Order").

[8] 50 Fed. Reg. 8149 (February 28, 1985).

[9] *See* Report and Order, General Docket Nos. 84-1231, 84-1233 and 84-1234, 2 FCC Rcd 1825 (1986) (hereinafter "Allocation Order").

[10] AMSS(R) is a mobile satellite service in which mobile earth stations are located on board aircraft. The (R) indicates that the spectrum is reserved for aeronautical communications of enroute flights related to the safety and regularity of flights. *See, e.g.*, Allocation Order at n. 115 (1986). Survival crafts and emergency position-indicating radiobeacon stations may also participate in this service. *See* 47 C.F.R. § 2.1.

[11] Footnote US308 was modified to provide AMSS(R) with priority access as well as real-time preemptive capability in the MSS and also to require that systems not interoperable with AMSS(R) operate on a secondary basis. *See* Memorandum Opinion and Order, General Docket Nos. 84-1231, 84-1233 and 84-1234, 2 FCC Rcd 6830 (1987) (herinafter "Allocation Reconsideration Order").

[12] This date was extended by subsequent orders, as discussed in paragraph 14, *infra*.

[13] *See* Second Report and Order at paras. 44-45.

[14] *See* Declaratory Order at paras. 4, 7.

[15] *See* Petition for Declaratory Ruling on MSSI's qualifications filed by Mobilesat (June 22, 1987); Letter from Counsel, Globesat to Chief, Domestic Facilities Division (July 16, 1987). *See also* Petitions to Dismiss Hughes, NAMS, Mobilesat, Global, MCCA and Skylink filed by MSSI (April 20, 1987).

[16] Hughes, MCCA, McCaw, MSSI and Skylink filed this request. It was opposed by Global, Globesat, NAMS, TCI and SMTC.

[17] The deadline was extended to September 4, 1987.

[18] *See* August 13th Order at para. 9.

[19] *Id.*

[20] The eight applicants were Hughes, MCCA, McCaw, Mobilesat, NAMS, SMTC, Skylink and TCI.

[21] *See* Dismissal Order at para. 5

[22] Globesat filed a separate opposition. The other seven applicants filed a joint opposition.

[23] Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983) (quoting American Iron & Steel Institute v. EPA, 568 F.2d 284, 293 (3rd Cir. 1977)). *See* 5 U.S.C. § 553(b)(3).

[24] *See* Action Alliance of Senior Citizens of Greater Philadelphia v. Bowen, 846 F.2d 1449 (D.C. Cir. 1988); National Black Media Coalition v. FCC, 791 F.2d 1016 (2d Cir. 1986).

[25] *See* Notice at para. 30.

[26] *See* Notice at para. 25.

[27] Those precedents included: (a) Alascom, Inc. and local carriers joint ownership of earth stations in the Alaska bush, *see* Earth Stations in the Bush Communities of Alaska, 92 FCC 2d 736 (1982); 49 Fed. Reg. 9727 (March 15, 1984); (b) AT&T and record carriers joint ownership of trans- Atlantic cable, *see* AT&T, 37 FCC 1151 (1964); (c) the formation of the MARISAT joint venture to provide maritime satellite communications, *see* Comsat Corp., 40 FCC 2d 496 (1973), *modified*, 42 FCC 2d 533 (1973).

[28] *See* Notice at para. 27.

[29] *See* Notice at para. 46.

[30] *See* Notice at para. 48.

[31] We ultimately decided to reject the option of having a voluntary consortium. After examining other alternatives, such as lotteries, auctions, comparative hearings and strict qualifying criteria, we determined that none of these approaches would be a more efficient means to accomplish a multiownership approach. *See* Second Report and Order at paras. 10-19.

[32] *See* Notice at para. 51, n. 81, and Attachment E. The requirement could be satisfied by various means: current assets, loans, service contracts, projected revenues, and other types of credit arrangements.

[33] *See* Notice at n. 81.

[34] *See Notice*, Attachment E, "Financial," Subpart C.

[35] *See also* WBEN, Inc. v. United States, 396 F.2d 601, 616 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968) (licensee alleging lack of notice has no cause for complaint when standards ultimately adopted were less severe than those proposed).

[36] In conjunction with this argument, Global also cites *Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1945).

[37] In the Matter of Policies Governing the Ownership and Operation of Domestic Earth Stations in the Bush Communities in Alaska, Tentative Decision, 92 FCC 2d 736 (1982) (Alaska Bush Tentative Decision); Final Decision and Policy Statement, 96 FCC 2d 522 (1984); Memorandum Opinion and Order Affirming and Clarifying the Final Decision, 59 RR 2d (P&F) 1161 (1986); Memorandum Opinion and Order Denying AT&T's Petition for Partial Reconsideration, 61 RR 2d (P&F) 463 (1986); General Communication Incorporated v. FCC, consolidated case nos. 84-1111, 84-1114, 84-1108, and 84-1109 (filed November 13, 1984 in the United States Court of Appeals for the District of Columbia Circuit), case pending.

[38] *See* United States v. Storer Broadcasting Co., 351 U.S. 192, 202-03 (1956); *see also* Upjohn Co. v. Food and Drug Admin., 811 F.2d 1583, 1585 (D.C. Cir. 1987) (*Storer* exemplifies the principle that no adjudicatory hearing is required where, as a result of generic rules that are otherwise procedurally and substantively valid, there is no contested issue.)

[39] *See* Columbia Communications Corp. v. FCC, 832 F.2d 189 (D.C. Cir. 1987); United States v. Storer Broadcasting, 351 U.S. 192 (1956).

[40] *See, e.g.*, Cellular Lottery Further Reconsideration Order, CC Docket No. 83-1096, 59 RR 2d (P&F) 407, paras. 13-14 (1985) (tentative selectee in a lottery, as well as sole applicant in a market, must demonstrate firm financing in order to move rapidly to construct and operate system).

[41] *See, e.g.*, Cellular Lottery Reconsideration, 58 RR 2d (P&F) 677, paras. 25-27 (1985) (adopted a stringent, rather than a "reasonable assurance, financial standard in order to deter speculative applications).

[42] *See, e.g.*, Licensing Space Stations in the Domestic Fixed-Satellite Service (CC Docket No. 85-135), 58 RR 2d (P&F) 1267 (1985) (hereinafter "1985 Domsat Licensing Order").

[43] For example, in 1983 we made conditional grants to several new entrants in the domestic Fixed-Satellite Service. None of the licensees were able to obtain the requisite financing, and their authorizations were nullified. *See* Advanced Business Communications, Inc., 58 RR 2d (P&F) 153 (1985); Rainbow Satellite, Inc., Mimeo No. 2583 (February 14, 1985); United States Satellite Systems, Inc., Mimeo No. 2584 (February 14, 1985). In 1985, recognizing the difficulty in arranging the large amount of financing required even when a construction permit is issued, we decided that FSS applicants must demonstrate compliance with the financial standard before a license is granted. *See* 1985 Domsat Licensing Order at para. 8.

[44] *See* Second Report and Order at para. 24.

[45] In response to Global's argument that our financial standard lacks a rational basis, we recognize that there is no definitive data supporting the $20 million figure for preoperational expenses. The chosen amount of $20 million was based on cost estimates contained in the various MSS satellite applications pending before us. In addition, from our general experience in processing satellite applications, we concluded that the $20 million estimate was reasonably accurate. Under the circumstances, more definitive cost information would have been impossible to obtain because there is no historical data concerning the actual costs of an MSS system. Moreover, as the original proposals demonstrated, MSS may be designed and implemented in a variety of ways, making it more difficult to predict costs.

[46] *See* Second Report and Order at para. 24 and n. 38. In addition, Global offers no basis for concluding that pre-operational expenses, such as research and development costs or coordination expenses, are not to be included in the costs to implement a satellite system. In addition, we did not limit the use of these initial contributions to preoperational expenses nor did we limit the applicant's initial contributions to a proportional share of pre-operational expenses.

[47] *See* Second Report and Order at para. 24 (footnote omitted).

[48] *See* Second Report and Order at para. 44. Contrary to Global's assertion, the elimination of speculative applicants was an important objective in deciding on a financial qualifications standard. We also think it reasonable to conclude that the presence of only financially qualified participants would increase the consortium's chances of attracting additional capital.

[49] For example, a minimum $1 million contribution was required to participate in the MARISAT consortium established in 1973. *See* COMSAT Corp., 40 FCC 2d 496, 507 (1973); *see also* Notice at para. 29, n. 62.

[50] We note that, contrary to Global's assertion, applicants do not retain control over their escrowed funds. Our intention was that the applicants release their contributions to form the capital core for the consortium's venture and, in effect, to be the "seed money" needed for preoperational and other expenses and to attract additional financing.

[51] *See supra* note 4.

[52] The Aviation Parties note the Commission's argument that limiting the MSS to one system will ease coordination with a possible separate AMSS(R) system. They argue that coordination would be made easier merely by confirming the preemptive rights of AMSS(R). The Commission has affirmed the preemptive rights of AMSS(R) on reconsideration of its *Allocation Order*. *See* Allocation Reconsideration Order at para. 54. Nevertheless, coordination would still be easier with only one MSS system in the band.

[53] On March 31, 1987, the President and Chief Executive Officer of Eastern Airlines, filed a letter in support of the Aviation Parties petition. The letter, however, while professing support for the petition, actually questions the wisdom of the Commission's allocation decision, an issue that was the subject of the *Allocation Order*, and not the *Second Report and Order*. Moreover, regardless of which decision is relevant, to the extent Eastern Airlines seeks to raise issues unrelated to the petition for reconsideration before us here, the letter is an untimely petition for reconsideration of the *Allocation Order*.

[54] *See* Notice at para. 23.

[55] We noted that one MSS system operating in a greater range of frequencies would provide sufficient flexibility to ensure that AMSS(R) has priority access. *See* Second Report and Order at para. 8. We have affirmed this requirement for an MSS system. *See supra* note 11.

[56] *See* Second Report and Order at n. 17. *See also* Notice at para. 23.

[57] *See* Second Report and Order at paras. 32-35.

[58] We have also indicated that we were not precluding the possibility of licensing additional systems in the future should additional frequency allocations be made or should technological developments make it feasible. *See* Second Report and Order at n. 16.

[59] The Aviation Parties noted that they also raised this issue in a petition for reconsideration of the *Allocation Order*, *supra* note 9, and incorporated by reference their pleading in that proceeding.

[60] *See* Allocation Reconsideration Order at paras. 50-55.

[61] Of course, today we have granted AMSC a license for both the MSS and AMSS(R) portions of the band; in the effect, this results in one entity providing both services over a single system. *See* MSS Licensing Order, FCC 89-183 (May 31, 1989).

[62] Additionally, Globesat challenges the financial qualifications criteria adopted in the *Second Report and Order* by incorporating by reference Global's petition for reconsideration of that decision. Because we have already addressed Global's arguments above, we will not consider those allegations here. We also note that Globesat's challenge of the *Second Report and Order* is untimely under section 1.429 of the Commission's rules. 47 U.S.C. § 1.429.

[63] MSSI's application for review incorporates by reference the general allegations it made in a motion for stay of the *Declaratory Order* filed with the U.S. Court of Appeals, Sixth Circuit. The court dismissed the motion pending review by the Commission of the *Declaratory Order*. *See* MSSI v. FCC, No. 87-3327 (6th Cir., June 17, 1987).

[64] *See* Second Report and Order at para. 24.

[65] MSSI suggests that the Bureau's *Declaratory Order* suddenly imposed this deadline without warning. That contention, however, ignores the express holding of the *Second Report and Order* and, thus, is meritless.

[66] *See* Declaratory Order at para 9.

[67] The two groups were composed of Hughes, Skylink, MCCA, McCaw, MSSI, Global, Globesat, and SMTC, on the one hand, and TCI and NAMS, on the other hand. Mobilesat declined to join either faction proposing a consortium because it disagreed with the negotiations being conducted by each group. Instead, it requested that the Commission become involved in the settlement process.

[68] MSSI seeks reconsideration of the Bureau's dismissal of its amendment to its pending MSS application, which MSSI submitted independently of the various consortium proposals. MSSI's amendment was intended to modify the technical proposal in its pending application to conform with the Commission's L-band frequency allocation adopted in the *Allocation Order*, *see supra* note 9. MSSI argues that the Bureau provided no reason for the dismissal. *See* August 13th Order at n. 22. We disagree. The Bureau indicated that the amendment was being dismissed for the same reasons that the two joint consortium amendments were dismissed: the *Second Report and Order* contemplated only one joint amendment.

[69] The Bureau had already asked several applicants for additional documentation to verify their April 13th filings. *See supra* para. 12.

[70] At the time that the joint opposition was submitted, the negotiations had not yet been brought to a successful conclusion.

[71] One faction proposed a two-tier ownership structure with some applicants contributing less than $5 million, assuming non-voting status, and holding only a 1 to 2% ownership interest, depending on the ultimate circumstances. The other group proposed that, although there would be equal ownership interests, the participants would not have to contribute their $5 million until after the MSS license was granted to the consortium. Both of these arrangements raised further questions concerning the financial qualifications of the applicants.

[72] *See* August 13th Order at para. 8. The Bureau also properly concluded that the grant of additional time to submit a joint amendment was a procedural rule change and that the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553, were inapplicable. *Id.* at n. 28.

[73] *See* August 13th Order at para. 20 and n. 23.

[74] MSSI also questions whether this action was within the scope of the Bureau's delegated authority. As we are now addressing this issue and affirming the Bureau, that question is moot.

[75] Global raises again the arguments that under section 308 of the Communications Act the Commission may only require the consortium, not the individual applicants, to satisfy the financial qualification requirement, and that the consortium needs only $20 million in initial contributions from the applicants to meet preoperational expenses in order to meet its financial requirements. We have previously addressed these allegations at paragraphs 28 and 30 above. To the extent that Global generally suggests that intervening circumstances have somehow altered the need for our financial requirement, we disagree. The reasons we gave for establishing our financial requirement are equally as valid today as they were when we issued the *Second Report and Order*.

[76] *See* Second Report and Order at n. 78.

[77] *See* August 13th Order at para. 9.

[78] The applicants were to submit to the Commission documentation of the central escrow account, the amount of funds deposited, and the names of the depositors no later than August 26, 1987. *See* August 13th Order at para. 15.

[79] *See* August 13th Order at para. 8. The Bureau ordered that those applicants not making the deposit by the established date would be dismissed for noncompliance with the Commission's orders. *Id.* at para. 14.

[80] Globesat had requested an extension of time to comply with the terms of the *August 13th Order*. The Bureau denied the request and affirmed its decision on reconsideration. *See* Dismissal Order at para. 5.

[81] Globesat claims that the *August 13th Order* mandated a substantive modification of the Bureau's escrow requirement as reflected in the *Declaratory Order* and thus notice and an opportunity to comment were required. Similarly, Global argues that the *Declaratory Order* lowered the financial requirement and, therefore, that it lacked sufficiently clear notice that the $5 million cash contribution requirement would be imposed. As we indicated in our discussion of the *Declaratory Order* at paragraph 39 above, while the Bureau did not strictly enforce our required financial showing initially, their lenient interpretation did not alter the essential requirement: applicants were expected to have immediate access to $5 million cash to invest in the consortium. *See* Declaratory Order at para. 7. Accordingly, we think no applicant was harmed by the Bureau's decision to impose the financial standard set forth in the *Second Report and Order*.

[82] Immediately after the *August 13th Order* was released, Global filed a letter requesting clarification of the order. *See* Letter of Counsel, Global to Chief, Common Carrier Bureau (August 18, 1987). Global suggested that the order's directive did not apply to it and other applicants who had already agreed among themselves to limit their cash contributions to less than $5 million each. The Bureau rejected this argument. *See* Letter of Deputy Chief, Common Carrier Bureau to Counsel, Global (August 20, 1987). Global then filed an application for review of the Bureau's response. Global's application was opposed by Mobilesat, NAMS, and TCI. In that application for review, Global raised essentially the same arguments as were set forth in its application for review of the *August 13th Order*, which we address herein. For the same reasons as discussed below, we deny Global's application for review of the Bureau's letter response to its request for clarification.

[83] *See* Second Report and Order at para. 24.

[84] *See* Second Report and Order at n. 38.

[85] NAMS and TCI chose this approach. In fact, both applicants cited the same problems with the escrow agreement as MSSI did. Nonetheless, they chose to participate under protest, and at the same time notified the Commission of their concerns. *See* Letter of Counsel, NAMS to Secretary, FCC (August 21, 1987); Letter of Counsel, TCI to Secretary, FCC (August 21, 1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 84-1234

In the Matter of

Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services

In the Matter of the Applications of

HUGHES COMMUNICATIONS MOBILE SATELLITE, INC.	File No. 1629-DSS-P/L-85
MCCA AMERICAN SATELLITE SERVICE CORPORATION	File Nos. 1630-DSS-P/L-85 1631-DSS-P-85
McCaw SPACE TECHNOLOGIES, INC.	File No. 1632-DSS-P/L-85
MOBILE SATELLITE CORPORATION	File Nos. 1633-DSS-P/L-85 1634-DSS-P/L-85 1635-DSS-P/L-85
NORTH AMERICAN MOBILE SATELLITE, INC.	File Nos. 1639-DSS-P/LA-85 1640-DSS-P-85
SATELLITE MOBILE TELEPHONE CO.	File Nos. 1646-DSS-P/L-85 1647-DSS-P/L-85
SKYLINK CORPORATION	File Nos. 1648-DSS-P/L-85 1649-DSS-P/L-85
TRANSIT COMMUNICATIONS, INC.	File Nos. 1650-DSS-P/L-85 1651-DSS-P/L-85 1652-DSS-P-85

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: May 31, 1989; Released: August 4, 1989

By the Commission:

1. By this order, the Commission authorizes the American Mobile Satellite Corporation (AMSC) to construct, launch and operate a mobile satellite system, subject to certain terms and conditions described below, within the Mobile Satellite Service (MSS).[1] We grant the applications filed by eight entities in this proceeding,[2] subject to certain conditions described below, thereby allowing them to participate in the consortium. We also authorize AMSC to offer, on a common carrier basis, a variety of domestic mobile satellite communications services, including land, aeronautical and maritime mobile satellite services.

I. BACKGROUND

2. In January 1985, we issued a *Notice of Proposed Rule Making* (*Notice*) [3] to allocate spectrum for MSS and to establish licensing procedures and regulatory and technical policies for MSS. The *Notice* also invited applications to construct, launch and operate MSS systems. Numerous comments were filed addressing the various issues raised by the *Notice* and twelve applications to construct and operate MSS systems were filed.[4]

3. In July 1986, we allocated 27 MHz of spectrum for MSS,[5] to be shared with the aeronautical mobile-satellite service (AMSS(R)).[6] The 1549.5-1558.5 and 1651-1660 MHz bands were allocated on a co-primary basis to MSS and AMSS(R), with AMSS(R) having priority and real-time preemptive access in accordance with a new Footnote US308 to the Table of Frequency Allocations in Section 2.106 of the Commission's Rules, 47 C.F.R. § 2.106. The 1545-1549.5 and 1646.5-1651 MHz bands were allocated to MSS on a secondary basis with AMSS(R) primary in these bands. The L-band allocation for MSS was affirmed on reconsideration with a minor modification to clarify the footnote.[7]

4. In January 1987, we adopted the *Second Report and Order* [8] in this proceeding that established licensing, technical and regulatory policies for MSS. We reached the following conclusions:

(a) that only one MSS system would be licensed for the first generation to use the entire allocated bandwidth, both co-primary and secondary segments;

(b) that the MSS license would be granted to a consortium comprised of all qualified and willing applicants;

(c) that each applicant would have to demonstrate its financial qualifications by making a $5 million cash contribution into the consortium;

(d) that the MSS space segment licensee would be regulated as a non-dominant common carrier subject to streamlined tariff filings and facilities authorization procedures;

(e) that the ground segment would be operated by multiple independent licensees including *inter alia* common carriers, non-common carriers and resellers;

(f) that state regulation of technical standards, entry and rate regulation of the space segment was pre-empted.

5. We also adopted guidelines for the formation of the MSS consortium and implementation of the MSS system. We ordered a two-step process to implement our decision that the consortium should be formed only by willing and qualified applicants. Applicants were ordered to demonstrate their financial qualifications and their willingness to participate in a consortium by putting their $5 million cash contribution into an escrow account by April 13, 1987. These qualified applicants would comprise the consortium. After that step was completed, the applicants as a group would develop the consortium's structure, with ownership interests proportional to each participant's total contribution, and would develop a technical proposal for a MSS system. We ordered the applicants to submit the operating agreement and technical proposal as joint amendments to their pending individual applications on July 27, 1987.[9] Finally, we ordered that any applicant not making an initial contribution to the consortium by the required date would have its application denied for noncompliance with our policies.

6. Subsequently, in response to a petition filed by two of the applicants, the Common Carrier Bureau issued a *Declaratory Order*[10] which concluded that other types of financial instruments were acceptable to demonstrate compliance with the financial qualification requirement established by the *Second Report and Order*. The Bureau determined that since they provided the same assurance as cash that the funds were immediately available, applicants could secure unconditional letters of credit or performance bonds as alternatives to depositing $5 million in cash in an escrow account by the required date. The Bureau also ordered each applicant to file documentation of its $5 million and to certify that the sum was immediately available, under its sole control, and could be freely transferred by the applicant to the consortium upon the applicant's decision to join. All of the then-pending applicants provided notifications by April 13, 1987 that purportedly complied with the Commission's financial requirements.[11]

7. On July 27, 1987, two separate MSS proposals were filed. One was jointly filed by a group of eight applicants; the other by a group of two. Although it did not waive its right to join a consortium, one applicant chose not to participate in either group and requested the Commission to become involved in the process.

8. On August 13, 1987, the Bureau dismissed both proposals,[12] noting that in the *Second Report and Order* the Commission contemplated only one jointly amended MSS application. Because the applicants indicated that they believed a full settlement was still possible, the Bureau extended the time to file the joint amendments to September 4, 1987. The Bureau also recognized that some applicants had alleged that questions about financial qualifications had impaired the settlement process. In order to resolve this issue expeditiously, the Bureau implemented the procedure enunciated in the *Second Report and Order* and ordered each applicant to make its initial $5 million cash contribution into the consortium. Specifically, the applicants were ordered to put their cash contributions into a central escrow account to be determined by a majority of the group no later than August 21, 1987. The Bureau stated that those not electing to continue participating must be permitted to withdraw their contribution with interest, if appropriate. The Bureau also ordered that the application of any applicant not making the escrow deposit by the required date would be dismissed for noncompliance with the Commission's orders.

9. On August 21, 1987, eight applicants -- Hughes, MCCA, McCaw, Mobilesat, NAMS, TCI, SMTC and Skylink -- each deposited $5 million cash into a central escrow account. The remaining three applicants -- Global, Globesat and MSSI -- did not contribute to this account. On September 4, 1987, the Bureau dismissed the applications of Global, Globesat and MSSI for failure to comply with the *Second Report and Order* and subsequent orders.[13]

10. The eight applicants were not able to agree to one joint proposal by the September 4, 1987 deadline. Five applicants[14] submitted a joint amendment and urged the Commission to accept it because it represented agreement among a majority of the pending applicants.[15] Three applicants objected to the joint amendment[16] and filed an Emergency Petition for Declaratory Ruling, requesting the Commission to endorse guidelines that it proposed for a joint operating agreement.[17] While the Bureau was reviewing the related filings, the eight applicants continued their negotiations. On February 1, 1988, they filed a revised joint technical proposal. On May 3, 1988, they filed a joint operating agreement. The Bureau accepted these joint amendments for filing and issued a public notice on May 25, 1988.[18]

11. In the joint amendment, AMSC proposed to construct, launch and operate three satellites and to provide a variety of land, aeronautical and maritime mobile satellite communications services. It requested the assignment of orbital locations at 75^0 W.L., 101^0 W.L. and 136^0 W.L. and the use of the following frequency bands: (a) 1545-1559 MHz and 1646.5-1660.5 MHz for mobile communications, and (b) 11.7-12.2 GHz and 14.0-14.5 GHz for feeder links and for telemetry, tracking and control (TT&C) functions.

12. Comments on the joint amendments were filed by American Telephone and Telegraph Company (AT&T); Communications Satellite Corporation (COMSAT); Contel ASC; Geostar Messaging Corporation (Geostar); and Mobile Satellite Service, Inc. (MSSI). Petitions to deny were filed by Aeronautical Radio, Inc. (Arinc) and Air Transport Association of America (ATA); Comsat General Corporation (COMGEN); GTE Spacenet Corporation (GTE Spacenet); and Globesat Express (Globesat). AMSC filed a consolidated opposition and response.

13. Reply comments and responses were filed by Arinc-ATA, AT&T, COMSAT, Contel ASC, Geostar, Globesat and GTE Spacenet. COMGEN withdrew its petition to deny.[19] In addition, the Federal Aviation Administration (FAA) filed general comments.

14. After further reviewing the joint amendments and the pleadings, the Bureau found that the feeder links requested by AMSC were inconsistent with Commission policies as described in the *Second Report and Order*, and it requested AMSC to amend its technical proposal to request frequencies for feeder link operations that conformed with the requirements. AMSC filed an application

for review of this request.[20] Nonetheless, in January 1989, AMSC responded to the Bureau's request and filed an amendment to its technical proposal. AMSC also filed a request for expedited action on its application, stating that it was prepared to proceed under either its initial proposal using 12/14 GHz frequencies for feeder links for all three satellites or using 11/13 GHz frequencies for the centrally located satellite as described in its further amendment. Arinc-ATA and Geostar filed comments on AMSC's request for expedited action; ASMC submitted a consolidated reply. The new amendment requested the assignment of orbital locations and frequencies for feeder links as follows:

(a) one satellite at 101^0 W.L. using the 10.70-10.95, 13.00-13.15, and 13.20-13.25 GHz bands (one polarization),

(b) one satellite at 62^0 W.L. using the 11.7-11.8 and 14.0-14.1 GHz bands (two polarizations),

(c) one satellite at 137^0 W.L. using the 11.7-11.8 and 14.0-14.1 GHz bands (two polarizations).

In addition, AMSC requested a waiver of Footnote NG104[21] in the Table of Frequency Allocations, *see* 47 C.F.R. § 2.106, in conjunction with its request to use the 11/13 GHz bands at 101^0 W.L. AMSC also requested a waiver of the Commission's decision in *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service* (hereinafter "1988 Domestic FSS Assignment Order")[22] in conjunction with its request to use the 12/14 GHz bands at 62^0 W.L. and 137^0 W.L. The Bureau issued a public notice on this amendment on January 25, 1989.

15. The further amendment on feeder link frequencies and orbital locations elicited petitions to deny from Arinc-ATA and GTE Spacenet; comments in opposition from National Association of Broadcasters (NAB); and comments from Contel ASC, Geostar, and National Cable Television Association, Inc. (NCTA). AMSC filed a consolidated opposition and response. Additional comments were filed by Arinc-ATA, GTE Spacenet, Geostar, Jones Spacelink, Ltd.-Jones Intercable, Inc. (Jones), King Videocable Company (King), and NCTA. Late-filed supplemental comments were submitted by Arinc-ATA, which present arguments relating primarily to another proceeding, *see Provision of Aeronautical Services via the INMARSAT System*, CC Docket No. 87-75,[23] and which raise no new arguments about issues in this proceeding.

II. THE APPLICANTS

16. The Commission has a statutory obligation to determine whether grant of an application to operate a radio station will serve the public interest, convenience and necessity. *See* 47 U.S.C. § 309(a). In this regard, we must determine whether an applicant has complied with all qualifying requirements, including financial qualifications, that we have prescribed pursuant to Section 308(b) of the Communications Act of 1934, 47 U.S.C. § 308(b).[24]

17. In the *Second Report and Order*, we determined that we would grant the MSS license to a consortium comprised of all qualified and willing applicants. To this end, we ordered each applicant to demonstrate its financial qualifications and its willingness to participate in a consortium by making a $5 million cash contribution into the consortium. We also ordered the applicants to amend their pending individual applications with one consortium ownership agreement and one technical proposal. Thus, the pending individual applications, as amended, have remained the subject of this licensing proceeding.[25]

18. In acting on the remaining eight applications to operate an MSS radio station, we must determine whether each of the applicants has complied with the prescribed MSS requirements, including the financial qualification requirement. We also must consider petitions to deny filed by Arinc, Globesat and MSSI that allege failure to comply with the financial qualification requirement. In addition, the Bureau previously had denied a petition filed by Hughes to deny TCI's application on the grounds that TCI had violated the cut-off rules.[26] In this order, we will address Hughes's petition for reconsideration of the Bureau's action.

A. *Financial Qualifications*

19. On reconsideration, we have affirmed our decision that each MSS applicant must satisfy the prescribed financial qualification requirement: "an initial $5 million cash contribution into the consortium."[27] We noted that it was our intention that the applicants release their contribution to form the capital core for the consortium's venture to be the "seed money" needed for pre-operational and other expenses and to attract additional financing.[28]

20. As discussed *supra*, the applicants could not agree on a joint amendment by the April 13, 1987 deadline set by the *Second Report and Order*. Some applicants alleged that questions regarding applicants' financial qualifications were impairing the settlement process. To resolve these questions and to facilitate a settlement, the Bureau ordered each of the applicants to put its $5 million cash contribution into a joint escrow account.[29] The pending eight applicants -- Hughes, MCCA, McCaw, Mobilesat, NAMS, SMTC, Skylink and TCI -- have complied with this requirement.[30] Nonetheless, several petitioners raise questions regarding the applicants' financial qualifications.

(1) *MSSI's petitions*

21. MSSI petitioned to deny the applications of Hughes,[31] MCCA, Mobilesat and NAMS on the grounds that the letters of credit each of them had obtained by the April 13, 1987 deadline as evidence of their financial qualifications were not unconditional. In order to eliminate the need to consider allegations such as these, the Commission required each applicant to place $5 million in a central escrow account. Since all of these applicants have subsequently made cash deposits into the joint escrow account and no longer rely on the letters of credit, MSSI's petitions against each of these applicants are now moot and are dismissed.

22. MSSI also petitioned to deny Skylink's application on the grounds that Skylink obtained its $5 million cash contribution as a loan from a limited partnership that, MSSI alleges, controls Skylink[32] and that the escrow agreement places conditions on Skylink's access to the funds. In opposition, Skylink claims that MSSI has misconstrued the terms of the escrow agreement and of Skylink's application. It claims that the limited partnership described in its original application is merely one that it had proposed to form if and when its application was granted and that such an entity does not currently control Skylink.[33] It further explains that the conditions

MSSI cites in the escrow agreement are standard business practice designed to protect the interests of the parties. MSSI's allegations, if true, would warrant denial of Skylink's application. However, we find that MSSI's allegations are not supported by the record. There is no evidence that the proposed limited partnership has been organized or that Skylink is currently controlled by a limited partnership. Moreover, the record shows that Skylink's access to its escrow funds are under its sole control and could be freely transferred by Skylink to the consortium, as we required.[34] Thus, MSSI's petition against Skylink is denied.

(2) ***Joint escrow account***

23. Although all of the remaining eight applicants have made cash contributions into a joint escrow account, as required, Arinc-ATA and Globesat petitioned to deny the amended applications based on AMSC's alleged failure to comply with financial qualification requirements. MSSI also raised this issue in comments.

24. Arinc-ATA argue that the applicants were ordered to provide in their joint amendment the information specified in Appendix B of the *1983 Fixed-Satellite Licensing Order*.[35] Because this includes detailed financial information as required of domestic Fixed-Satellite Service (FSS) applicants, Arinc-ATA argue that the MSS applicants must meet two financial standards: (a) as individual applicants, the $5 million cash contribution into the consortium in order to participate in that venture; and (b) as a consortium, the FSS standard to show they can construct, launch and operate the system for one year. Arinc-ATA claim that the applicants have not met the second requirement.

25. Globesat and MSSI complain that the joint operating agreement submitted by the applicants does not obligate them to contribute $5 million each to the consortium. Globesat notes that under the agreement no applicant will subscribe to more than $25,000 in shares and that the shareholders have agreed to retain the escrow account only until the Commission relieves them of the requirement. Globesat and MSSI also complain that NAMS, which will hold only 1.5% of the consortium's shares and will be a non-voting shareholder, can borrow up to $5 million from the other shareholders to finance its own investment and can use its share of cash dividends to repay the loan. Globesat claims that the Commission had disallowed such loan arrangements as a means of satisfying the $5 million cash contribution requirement when it dismissed partial settlement agreements that contained such terms. Globesat also argues that allowing NAMS to borrow its investment funds from other consortium members is at odds with our stated intention to prevent speculation in the licensing process.[36] MSSI argues that if NAMS can participate under AMSC's agreement, any of the original applicants that could have demonstrated the ability to contribute $5 million to the consortium should be allowed to participate on the same terms as NAMS.[37]

26. In opposition, the applicants claim that they have met the Commission's financial requirement by depositing $5 million each into the central escrow account. The applicants allege that they were only required to make the escrow deposit and make the funds immediately available, but that they were not required as shareholders to make a permanent investment of $5 million each in the consortium. They also argue that the Commission has determined that the consortium could arrange full financing of its proposed satellite system after an authorization was granted,[38] and, thus, they were not required to provide all of the financial information specified in Appendix B for FSS applicants. In reply, Globesat argues that the consortium operating agreement, which fails to commit each applicant to a $5 million investment in the enterprise, demonstrates that the Commission had no rational basis or purpose for requiring a $5 million escrow deposit.

27. At the outset, we wish to reiterate two points that we clarified on reconsideration of the *Second Report and Order*. First, only one financial qualification requirement was established for the MSS: "an initial $5 million cash contribution into the consortium."[39] Unlike domestic FSS applicants, the MSS aplicants are not required to demonstrate their ability to construct, launch and operate for one year the proposed satellite system. Second, we explained that the MSS financial qualification requirement applied to each individual applicant, not to the consortium as a separate entity.[40] Thus, we must determine whether each individual applicant meets the requirement.

28. We clarified on reconsideration that the financial qualification criteria is a cash contribution into the consortium, not a mere showing of ability and willingness to contribute to the venture.[41] Further, the *Second Repon and Order* stated that, although ownership interests in the consortium should be proportional to each participant's capital and non- capital contributions, the minimum investment of each shall be the $5 million initial contribution.[42] Proportional ownership interests would be based on contributions, if any, in excess of the initial $5 million contribution.[43] We affirmed the investment requirement on reconsideration.[44]

29. AMSC's chosen mechanism for transferring funds from the central escrow account into the consortium is contained in its joint operating agreement, not its Escrow Agreement.[45] Under the consortium's Stockholders' Agreement, each participant has initially subscribed to some shares in the corporation that were paid by a transfer of funds from the escrow account.[46] Although the initial stock subscription has not resulted in all of the funds in the escrow account being converted into investment shares,[47] AMSC's Certificate of Incorporation does provide for additional subscription offers to the stockholders.[48] The applicants can convert the remaining funds in the escrow account into investment shares either by modifying the Stockholder's Agreement or by authorizing an additional subscription offer under their Certificate of Incorporation.[49] Because the applicants have yet to complete the transfer of funds, thereby complying with the financial qualifications requirement, we condition our grant of each individual application upon each party individually providing certification to the Commission that it has completed a minimum $5 million cash stock investment in the corporation.[50] If a party does not provide such certification, as required, its authorization to participate in the consortium will be found null and void. AMSC must certify within 70 days of the release of this order that each of its members has made the required investment.

30. As an additional matter, we find that NAMS can neither withdraw its $5 million escrowed contribution to the consortium nor substitute in lieu of that contribution a $5 million stock investment in the consortium purchased with loans obtained from the other stockholders in the consortium, and secured by a pledge of those same

shares to these lenders, including any future profits.[51] As we affirmed on reconsideration, we chose the prescribed financial standard, in part, because each applicant's demonstrated ability and willingness to help finance the system from the outset would contribute to the establishment of this new service and speculative applicants would be detered.[52] The presence of only financially qualified participants would increase the consortium's chances to attract additional financing and would make service available promptly to the public.[53] After the Stockholders' Agreement was filed, NAMS sought permission from the Bureau to withdraw its escrow contribution without losing the right to participate in the consortium.[54] It argued that its $5 million contribution was not needed because, under the Stockholders' Agreement, its initial capital contribution was limited to 1.5% of the shareholders' equity (worth only $2,730 under the Stockholder's Agreement) and that amount would be loaned to it by the other participants. On reconsideration, we have affirmed that applicants could not agree to a smaller ownership share in the consortium, thereby avoiding the $5 million cash contribution, and that proportional ownership interests would be based on contributions, if any, in excess of the initial $5 million.[55] Moreover, while the Stockholders' Agreement also provides that NAMS may borrow up to $5 million from the other consortium members to purchase additional shares, we find that this arrangement cannot be used to satisfy NAMS's $5 million contribution to the consortium because NAMS would not be the owner of record of the shares purchased with the $5 million loan, and thus would not be the real party in interest for those investment shares and would not be helping to finance the consortium from the outset as required. The loan arrangement described by the Stockholders' Agreement is not consistent with the goals underlying our prescribed financial standard. The principal and interest amounts owed by NAMS would be paid from the cash dividends due NAMS as a stockholder and assigned by NAMS to the lender. The lender would become the owner of record of the pledged shares. In addition, NAMS's liability for any amount owed to the lender would depend solely on the value of the shares and speculative future profits because, under the agreement, the lender could not obtain a judgment against NAMS for the debt if NAMS were in default. Thus, NAMS's participation in the consortium would be based not on NAMS's ability to contribute to the project from the outset but, rather, on the consortium's future performance.[56] Finally, to the extent that these terms would limit NAMS's ownership interest to 1.5%, it is inconsistent with our policy, discussed above, that applicants cannot agree to limit their ownership share and thereby avoid the $5 million cash contribution. In these circumstances, NAMS would neither contribute financially to the consortium nor would its participation increase the consortium's chances of attracting financing. Only if NAMS is able to contribute to the establishment of the consortium, as its $5 million escrow deposit currently attests, does it satisfy our financial qualification requirement consistent with the guidelines described above in paragraph 29.

B. *TCI*

31. In April 1987, TCI amended its pending MSS application to show that Wismer and Becker Systems Technologies Co. (W&B) had withdrawn from its partnership with TCI, leaving TCI as the sole corporate applicant. Hughes petitioned to dismiss TCI's application, alleging that the transfer of W&B's 51 percent partnership interest to TCI amounted to a major change in ownership and control of the applicant in violation of the cut-off rules.[57] Hughes complained that the loss of W&B substantially affected TCI's funding and that TCI received its $5 million escrow deposit as a loan from GTE Spacenet Corp. (GTE) in exchange for an option to acquire 80% control of TCI. The Bureau denied Hughes's petition on the grounds that: (a) Hughes presented no evidence that the acquisition of the withdrawing partner by the surviving partner had resulted in a change in control of the applicant and (b) TCI's assumption of full ownership was a legitimate business transaction to ensure that the business plan survived.[58] The Bureau also stated that it was premature to act on stock options until the options were exercised.[59]

32. Hughes has petitioned for reconsideration of the Bureau's decision, alleging that the Bureau has misunderstood the facts in the record and that its decision is inconsistent with prior Commission precedents. Hughes argues that TCI's original application indicated only that ownership interests in the partnership were divided 51% for W&B and 49% for TCI and that no evidence of different voting or controlling interests between the partners has been provided. Hughes also claims that the partnership's only surviving business plan is the continued prosecution of the pending MSS application and that this is not a legitimate business purpose justifying waiver of the cut-off rules under Commission precedents.[60] TCI opposes the petition, arguing that Hughes presents no new facts for consideration and that there is no substantial change in an applicant when a surviving partner assumes sole control of a business upon the withdrawal of another partner. TCI also argues that, even if the change in control was major, it was entitled to a waiver of the cut-off rules because no new party assumed ownership and it had a legitimate business reason to continue prosecuting the application.

33. Under Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 309, a substantial change in the ownership or control of an applicant is a major amendment requiring public notice and an opportunity for comment. While, in many instances, Commission cut-off rules are generally applicable to major amendments (*e.g.*, substantial technical changes, change of frequency bands, etc.) administrative exemptions for certain major ownership changes may be justified for applicants in common carrier services if we find that the change is in the public interest.[61]

34. A transfer of 50 percent or more of an ownership interest in an applicant, as is the case here, is generally considered to be a substantial change in ownership or control under Section 309.[62] We find that, under the particular circumstances of this case, it is in the public interest to exempt TCI from the cut-off rules. Upon W&B's withdrawal from the partnership, complete ownership of the applicant passed to TCI, the sole surviving partner. There are no new owners with substantial interests for the Commission's consideration. Further, TCI avers that it was the partner that managed and controlled the daily business activities, rendered and executed policy decisions, prepared and prosecuted the MSS application, and developed the technological and engineering aspects of the MSS application. These contentions are not questioned by Hughes. Thus, there is no indication that TCI

assumed full ownership merely to obtain the pending application[63] or to abuse our administrative processes.[64] Accordingly, Hughes's petition is denied.

C. ***Additional Issues***

35. As discussed above in paragraphs 5-10, the MSS applicants were to file a joint amendment, including their operating agreement and technical proposal, by July 27, 1987. When the Bureau dismissed the two separate proposals that were filed on that date, it extended the time to file the joint amendment to September 4, 1987.[65] On that date, five applicants filed a proposal that was not accepted for filing by the Bureau. Three applicants filed an Emergency Petition for Declaratory Ruling, objecting to the proposal and requesting Commission endorsement of guidelines for a joint operating agreement.[66] On February 1, 1988, the eight applicants filed a revised joint technical proposal, and on May 3, 1988, a joint operating agreement. The Bureau accepted these amendments for filing.

36. Arinc-ATA complain that the Bureau lacked delegated authority to extend the filing deadline because, under 47 C.F.R. § 0.291(a)(2),[67] the processing of the application is a novel question for which the Commission established a definite schedule. Arinc-ATA argue that the late-filed amendments should be rejected as unauthorized and for substantially delaying the implementation of service to the public.

37. We do not agree with Arinc-ATA that the extension of filing deadlines presents a novel question of fact, law or policy. The Bureau routinely responds to requests for extension of time in both licensing and Rule Making proceedings.[68] Even though the filing schedule in this proceeding is viewed as a rule of procedure, as Arinc-ATA suggest, the Bureau's action in extending the deadline was tantamount to a waiver of a procedural rule and thus was within the scope of its delegated authority.[69] In any event, regardless of whether the Bureau's action was within its delegated authority, we affirm its actions. The Bureau's decision to accept the late-filed joint amendments appears to have recognized the difficulties the applicants had in reaching full settlement and the additional substantial delay in implementing the service if the proffered amendments had been rejected. Therefore, the extension was in the public interest.

38. Globesat requests the Commission to require disclosure of any separate agreements among the applicants regarding system design and procurement, network management, marketing, and interim service.[70] Globesat, claiming that these issues resulted in anti-competitive agreements among some of the applicants early in the settlement negotiation process, alleges that similar "secret" arrangements still exist that would divide ownership benefits among only a few participants.[71] These arguments are similar to those raised by three of the applicants in the Emergency Petition for Declaratory Ruling.

39. Even though these allegations might warrant dismissal if true, Globesat provides no evidence that separate, anti-competitive agreements exist among the applicants that would allow only a few participants to reap the full benefits of ownership. Further, the three applicants who had raised similar concerns in their Emergency Petition have joined with the other remaining applicants and have agreed to a consortium structure. The circumstances upon which the applicants' concerns were based are not evident in the joint operating agreement that is now before us. Thus, we have no reason to believe that separate, anti-competitive agreements exist among the applicants.

40. Accordingly, we find that: (a) the applicants have complied with the requirement prescribed by the *Second Report and Order* and have developed a consortium structure and a technical proposal and submitted these as joint amendments to their pending individual applications, and (b) the issues raised by the Emergency Petition for Declaratory Ruling are now moot and the petition is hereby dismissed.

D. ***Conclusion***

41. We find that Hughes, MCCA, McCaw, Mobilesat, NAMS, SMTC, Skylink and TCI have complied with the prescribed qualifying requirements conditioned upon each one certifying that it has completed a minimum $5 million cash stock investment in the corporation, as discussed above in paragraphs 29-30.

III. THE MOBILE SATELLITE SYSTEM

42. AMSC has proposed to construct, launch and operate three satellites and to provide a variety of land, aeronautical and maritime mobile satellite communications services. The satellites would be located at 62^0 W.L., 101^0 W.L. and 137^0 W.L. AMSC has requested full use of the frequency bands at 1545-1559/1646.5-1660.5 MHz, which have been allocated for aeronautical and mobile satellite services, for communications between the space stations and the mobile units.[72] AMSC also has requested use of the following frequency bands for feeder link operations (*i.e.,* the transmission paths between the space stations and fixed hub earth stations): (a) at 101^0 W.L., the 10.70-10.95 GHz and the 13.0-13.15/13.20-13.25 GHz bands (one polarization), and (b) at 62^0 W.L. and 137^0 W.L. the 11.7-11.8 GHz and the 14.0-14.1 GHz bands (two polarizations). It proposes to provide a full range of aeronautical and mobile satellite services, including:

(a) mobile telephone service (MTS) - voice communications interconnecting mobile land vehicles, boats or aircraft and the public switched telephone network;

(b) mobile radio service (MRS) - a two-way voice dispatch service between a user terminal and a base station;

(c) mobile data service (MDS) - two-way data communications that may be combined with MTS or MRS;

(d) aeronautical service - voice and data communications for safety and other purposes, including

(1) air traffic control (ATC) - communications related to safety and regularity of flight,

(2) aircraft operational communications (AOC) - flight management communications between the aircraft and ground facilities,

(3) airline administrative communications (AAC) - communications to improve airline customer services,

(4) airline passenger communications (APC) - commercial voice and data passenger communications;

(e) transportable service - telephone and two-way data communications to users in sparsely populated areas using portable terminals at fixed locations.

(f) paging service - one-way communications on a non- interference basis in the 1558.5-1559 MHz band.

A. *A Generic Mobile Satellite System*

43. Arinc-ATA petitioned to deny AMSC's application on the grounds that the aviation parties would be denied due process if AMSC were authorized to operate in the whole 1545-1559/1646.5-1660.5 MHz bands and to offer AMSS(R) and APC. Claiming that the Commission has not precluded a separate AMSS(R) system in the bands, Arinc-ATA argue that a separate AMSS(R) system would effectively be cut-off, at least for the co-primary portions of the bands at 1549.5-1558.5/1651-1660 MHz, if AMSC's application is granted. The petitioners also argue that the aviation community did not forfeit the right to use the co-primary band segments for a separate AMSS(R) system by not filing an application by the cut-off date for filing MSS applications.[73] Arinc-ATA also contend that the Commission cannot consider AMSC's application for AMSS(R) in the lower band segment at 1545-1549.5/1646.5-1651 MHz, where that service is primary, without calling for AMSS(R) applications. In addition, Arinc-ATA claim that the Commission has never stated that APC service could only be provided as a MSS offering[74] and that APC was recognized as an aeronautical service by the 1987 Mobile Services World Administrative Radio Conference (1987 Mobile WARC).[75] The petitioners also assert that even if AMSC's proposal is treated as an AMSS(R) system, AMSC cannot provide APC in the lower band segment under the Commission's allocation. The petitioners also argue that if a separate AMSS(R) is precluded in the co-primary band segment or not allowed to provide APC, the Commission would be expanding the scope of the MSS cut-off retroactively and unlawfully. The petitioners claim that the *Notice* in Gen. Docket No. 84-1234 and the MSS cut-off did not provide notice that all applications for use of the L-band, including AMSS(R) and APC services, had to be filed or that the MSS would be given the exclusive right to use the whole band and to provide APC services.[76] Finally, Arinc-ATA claim that the Commission must consider Arinc's application to construct a separate AMSS(R) system (AVSAT)[77] simultaneously with AMSC's application since they are mutually exclusive. Arinc-ATA allege that the Commission has accorded discriminatory treatment to the AVSAT application regarding filing deadlines, scope of services, use of the co-primary frequencies, and financial qualification requirements.

44. When we initiated this proceeding in 1985, we were concerned with allocating spectrum and establishing policies for a mobile satellite service that would provide primarily domestic land mobile service. From the outset, however, we recognized that other categories of mobile and fixed communications could be provided by a MSS system, including rural telephone service,[78] voice and data communications for the oil, gas and transportation industries,[79] and aeronautical mobile satellite services.[80] Indeed, we stated in the *Notice* that MSS appeared capable of providing a variety of fixed and mobile services that did not fall within previously defined categories, and we proposed not to prohibit "any auxiliary or incidental common carrier service . . . provided that the primary purpose of such satellites is to provide mobile radio services by satellite."[81] In regard to aeronautical communications specifically, we indicated in the *Notice* that MSS applicants could apply to offer certain non-safety services, such as passenger public correspondence service,[82] as well as certain safety services, including some air traffic control (ATC) functions.[83] We further indicated that, if we allocated L-band frequencies for MSS, a MSS system might be required to provide, or take into consideration, ATC and APC.[84] We did not proscribe the potential service offerings for MSS in the *Second Report and Order*. Consequently, AMSC's proposal to provide generic mobile satellite services, including land, aeronautical and maritime mobile satellite services, and to provide certain fixed satellite services, such as rural telephone and transportable,[85] is within the broad range of services covered by the *Notice* for filing MSS applications. Accordingly, as we explained in the *Allocation Further Reconsideration Order* at paragraphs 24-26, the Commission did not retroactively expand the types of services to be provided by the MSS licensee after the cut-off date for MSS applications.

45. On the other hand, the *Notice* did propose to retain a separate allocation for AMSS(R) and to preserve the option to pursue the development of a separate AMSS(R) system.[86] We noted in our discussion that the aviation industry, which was interested in using satellites to expand ATC and surveillance functions,[87] was studying the use of satellites for AMSS(R),[88] but the industry had reservations about sharing allocated spectrum with MSS.[89] We also indicated that, although AMSS(R) included ATC, navigation and surveillance services, it did not include APC service.[90] Thus, only safety communications could be included within a separate AMSS(R) system if such a system were proposed. Any incidental or auxiliary domestic mobile common carrier services, such as APC, were treated by the *Notice* as potential MSS offerings. Anyone wanting to provide those services should have applied to be an MSS licensee. To the extent that the *Notice* proposed to retain a separate AMSS(R) allocation that could be used by a separate AMSS(R) system as described by the *Notice*, we did not cut-off such applications for use of the L-band nor did we ascribe all potential AMSS(R) offerings to the MSS. However, as we explained in the *Allocation Further Reconsideration Order* at paragraph 39, any AMSS(R) system applicant would be subject to any changes made in the L-band allocation.

46. We ultimately chose an allocation scheme based on a sharing arrangement between AMSS(R) and MSS, as discussed *supra* at paragraph 3. The allocation scheme implicitly requires that each service be allowed access to the whole bandwidth, either on a primary-secondary or on a co-primary basis. While our decision did not preclude "certain separate aeronautical systems," it led the way for "shared-service satellites to provide both generic MSS and dedicated aeronautical functions."[91] The sharing requirement also could be met with interoperable separate systems. We deferred establishing technical guidelines to accomplish sharing unless it appeared necessary to ensure AMSS(R) priority access to the whole bandwidth.[92]

47. AMSC has requested authority to provide both MSS and AMSS(R over a single satellite system. As an initial matter, the *Notice* in this proceeding cut-off competing MSS applications on March 29, 1985. Because we never established a cut-off for AMSS(R) applications, proposals for such systems could have been filed at any time. In-

deed, we accepted for filing Arinc's AVSAT application, provided public notice and requested comments on it. Further, when we dismissed the AVSAT application, we invited Arinc to refile an acceptable application at a later date. Arinc did not do so.[93] Thus, Arinc and other potential AMSS(R) applicants have had ample opportunity to file competing applications.[94] We find that the public interest would be served best by granting AMSC's application to be the licensee for both MSS and AMSS(R).[95] This action may, as a practical matter, preclude another domestic AMSS(R) licensee in the 1545-1549.5 MHz, 1646.5-1652 MHz bands. For the reasons discussed below, we will authorize AMSC to establish and operate a combined MSS-AMSS(R) system using the full bandwidth at 1545-1559/1646.5-1660.5 MHz subject to coordination. Of course, our authorization is conditioned on AMSC's ability to comply with the allocation requirement that AMSS(R) service have priority and real-time preemptive access to the whole bandwidth. If AMSC's MSS-AMSS(R) system can not meet reasonable and necessary technical requirements and system specifications for AMSS(R), a separate domestic AMSS(R) system could be justified in these bands, and AMSC's system will be required to operate on a secondary basis to the AMSS(R) communications provided on a separate system.[96]

48. As discussed above, we had left unresolved the question of how the spectrum sharing arrangement should be achieved. We did indicate, however, that the requirement could be met with either one generic system or two separate interoperable systems. Thus, our decision to authorize one generic mobile satellite system is consistent with the options previously discussed in this proceeding. Arinc, in proposing AVSAT, sought to operate a separate AMSS(R) system. However, in pursuing this option, it was incumbent on Arinc to propose a system that complied with the allocation requirements. Instead, the AVSAT system proposal challenged the underlying premise of our allocation decision and advocated a further allocation of the co-primary band segment that would have limited AMSS(R) and MSS to separate and distinct portions of that band, in a manner that was inconsistent with our rules.[97]

49. We also find that there is no reason not to authorize AMSC to provide both MSS and AMSS(R) over one satellite system. Moreover, a single MSS-AMSS(R) system will ensure efficient use of spectrum, promote safety, and introduce new services to the public in a timely manner. We previously found that AMSS(R) will not need the full L-band allocation under normal circumstances.[98] Given the limited amount of spectrum available for mobile satellite operations overall, it is efficient to allow other mobile services to use the band subject to priority access and real-time preemption for AMSS(R). By incorporating both generic mobile and AMSS(R) services on one space platform, certain cost efficiencies should be realized that will ensure the availability of satellite capacity (power and bandwidth) for AMSS(R) in the near future.[99] Also, the U.S. should not lag behind other countries in striving to implement a full range of aeronautical and mobile satellite services. Access to orbit-spectrum resources and the requirements of the international coordination process necessitate timely action in authorizing a generic mobile satellite system.[100] In addition, the aviation parties will not be denied access to satellite capacity. The MSS-AMSS(R) system will be operated on a common carrier basis, and Arinc or any other interested aviation entity could be a customer or a reseller of satellite services, especially APC services.[101]

50. An additional matter is Arinc-ATA's claim that we have not treated the AVSAT and AMSC applications similarly. We believe the specific concerns raised in this regard are misplaced. For example, all of the services proposed by AMSC are within the service categories described in the *Notice*, whereas Arinc proposed to offer a service that the *Notice* included within the MSS, not the AMSS(R). In addition, nothing in our rules requires AMSC to demonstrate why its needs cannot be met by using spectrum now allocated by the U.S. for maritime satellite service (*e.g.*, 1530-1544/1626.5-1645.5 MHz),[102] whereas the L-band allocation adopted in General Docket No. 84-1234 requires Arinc to demonstrate compliance with the U.S. L-band allocation decision in order to submit a *bona fide* application. Finally, we have found that the MSS applicants have complied with the requisite financial qualification requirement prescribed by the *Second Report and Order*, and, on reconsideration, the Commission no longer considers the AVSAT application defective on financial grounds.[103]

51. In conclusion, we believe it is in the public interest to authorize AMSC to provide a full range of land, aeronautical and maritime mobile satellite services, as well as certain fixed satellite services, as described in its joint amendment (*see supra* paragraph 42). Arinc-ATA object to the proposed transportable services on the grounds that these fixed-satellite services are not covered by the L-band allocation. We will allow AMSC to provide on an incidential or auxiliary basis certain fixed-satellite services, such as rural telephone and transportable service, because they will be able to serve segments of the population that have few alternative communication services. However, AMSC will have to provide these fixed-satellite services on a non-interference basis in these bands - *i.e.*, interference protection must be provided to all permitted uses of the band, both primary and secondary, and no interference protection can be claimed from any permitted use of the band, pursuant to 47 C.F.R. § 2.104.

B. *Orbit Locations and Frequency Bands*

52. For the reasons discussed below, we are assigning AMSC orbit locations at 62^0 W.L., 101^0 W.L., and 139^0 W.L. For mobile operations at each of these locations, we are authorizing AMSC to pursue full use of the 1545-1559/1646.5-1660.5 MHz bands, pursuant to the U.S. domestic allocation, and subject to international coordination. For feeder link operations, we are authorizing AMSC to use: (a) at 101^0 W.L., 100 MHz (both uplink and downlink in the 10.70-10.95/13.00-13.15/13.20-13.25 GHz bands, and (b) at 62^0 W.L. and 139^0 W.L., the 11.7-11.8/14.0-14.1 GHz bands. The 137^0 W.L. orbit location requested by AMSC has been reserved for high power domestic FSS satellites,[104] thus we are assigning AMSC the adjacent location, 139^0 W.L.

(1) *L - Band Operations*

53. In the 1545-1549.5/1646.5-1651 MHz band segments, AMSS(R) traffic will be primary, and all other mobile service communications, including non-safety aeronautical communications such as APC, will be secondary. All mobile communications will be co-primary in the

1549.5-1558.5/1651-1660 MHz band segment. In addition, AMSS(R) communications will have priority and real-time preemptive access in the whole band.[105]

54. Arinc-ATA oppose AMSC's spectrum utilization plan because it is generally not consistent with the allocation decisions of the 1987 Mobile WARC.[106] Arinc-ATA also suggest that, if AMSC needs more than 4 MHz in each band for land mobile satellite service, it should use other spectrum allocated for land mobile satellite use by the 1987 Mobile WARC - *e.g.*, the maritime bands at 1530-1544/1626.5-1645.5 MHz.[107] In response, AMSC states that use of the full allocated L-band by a generic mobile system is more efficient than restricting services to discrete portions of the spectrum because market forces will determine actual use of spectrum by the different services. To assuage the aviation community's concerns regarding availability of spectrum, AMSC claims it will set aside certain frequencies for only AMSS(R) use pursuant to agreement with prospective aeronautical service providers (*e.g.*, the FAA or the airlines). AMSC also argues that, whereas the Commission has already determined that MSS can use the full band at 1545-1558.5/1646.5-1660 MHz, the maritime bands are not currently available internationally for land mobile use. [108] Arinc-ATA reply that the AMSC's willingness to set-aside frequency for AMSS(R) undermines the spectrum sharing arrangement established by the allocation. They also argue that, if AMSC is a monopoly provider for both MSS and AMSS(R), market forces will not resolve competing claims for frequency.

55. In general comments reflecting its responsibility for civil aviation safety, the FAA urged that the quality of safety communications be guaranteed. In this regard, the FAA proposes that we require, either by regulation or conditions on a MSS license, that in the 1545-1558.5/1646.5-1660 MHz bands: (a) any service or system not satisfying AMSS(R) requirements will be a secondary service or system, and (b) for any system operating in the bands, AMSS(R) must have priority and preemptive access to the full bandwidth. The FAA also suggests that spectrum sharing should evolve based on demonstrated capability. For example, a certain amount of spectrum would always be reserved exclusively for AMSS(R), and other mobile services would be restricted initially to the top 4 MHz of each band. Those services would gradually migrate into the lower band if non-interference to AMSS(R) is demonstrated for at least one year. In addition, the FAA, citing expected increased demand for spectrum for AMSS(R) and other mobile services, also supports reallocating the maritime bands to include land mobile satellite services.

56. Arinc-ATA's objection to AMSC's spectrum utilization plan is without merit. AMSC's plan complies with the U.S. domestic allocation, and we have determined in a separate proceeding that it is not necessary to conform the U.S. allocation to the new ITU allocation.[109] We also believe that the current requirements for AMSS(R) in the U.S. allocation provide the basis to satisfy the FAA's concerns that the quality of safety communications be protected. In the 1545-1549.5/1646.5-1651 MHz segments where only AMSS(R) is primary, AMSS(R) is entitled to interference protection from all other permitted uses. If interference from other mobile traffic is caused to AMSS(R) traffic, we will order the other mobile operations to cease immediately. In the co-primary segment at 1549.5-1558.5/1651-1660 MHz, both AMSS(R) and MSS are entitled to interference protection.[110] AMSC is required to design and operate its generic mobile satellite system to achieve these interference objectives. We recognize, however, that these objectives may be difficult to achieve in a combined MSS-AMSS(R) system. For example, if interference from a MSS user on a particular frequency in one beam causes interference to an AMSS(R) user on the same frequency in another beam, the aeronautical safety communication must be assured interference protection. Consequently, we do not believe it is necessary to limit initially MSS access to the top 4 MHz of each band and to control the migration of MSS traffic into the lower band, as the FAA suggest, to ensure non-interference to AMSS(R). The U.S. allocation also satisfies the FAA's other concern by requiring that AMSS(R) traffic have priority and real-time preemptive access to the full bandwidth. If a system operating in these bands does not comply with this requirement, it can operate only on a secondary basis.

57. If AMSC chooses to set aside certain frequencies for only AMSS(R) traffic in order to ensure interference protection, this voluntary action is not necessarily inconsistent with the U.S. allocation. Even though AMSC will be a monopoly provider, it has an obligation to satisfy the aeronautical community's needs for high quality service and sufficient capacity (satellite power and bandwidth) to meet AMSS(R) needs and requirements. The actual demand for AMSS(R) will determine how much capacity is assigned for such use. Because demand for AMSS(R) will probably be dynamic, we expect AMSC to be responsive to these changes as they occur.

58. The use of the maritime bands for land mobile satellite services is not at issue here and will be the subject of a separate proceeding.[111] At that time, we will consider how the availability of additional spectrum will further the development of mobile satellite services for the United States.

59. Finally, AMSC has requested use of the 1558.5-1559/1660-1660.5 MHz band segments. We have allocated the 1660-1660.5 MHz segment on a co-primary basis to AMSS(R) and the Radio Astronomy Service (RAS). The 1558.5-1559 MHz band is allocated to AMSS(R) and treated as if it were the paired band for RAS. These bands have not been allocated to MSS in order to avoid harmful interference to RAS. AMSC seeks authority to offer a one-way paging service, which would be a MSS use, in the 1558.5-1559 MHz band on a non-interference basis. No comments were filed in opposition to this request. We will allow this use provided the service operates without causing harmful interference to all other permitted uses in the band - *i.e.*, interference protection must be provided to all permitted uses of the band, both primary and secondary, and no interference protection can be claimed by AMSC from any permitted uses of the band. In addition, we recognize AMSC's ability to use the 1558.5-1559/1660-1660.5 MHz band segments for AMSS(R) provided it satisfies the allocation requirements and avoids harmful interference to the RAS.

(2) *Feeder Link Operations*

60. In an application for review, AMSC challenges the Bureau's request that the MSS proposal be further amended to specify frequency bands other than 12/14 GHz for feeder links. AMSC argues that the Bureau misinterpreted prior Commission decisions in this proceeding that instructed the MSS applicants "to propose frequencies for

feeder links in fixed-satellite bands other than those currently used by satellites in the domestic fixed-satellite service."[112] AMSC interprets this requirement as allowing MSS feeder links at 12/14 GHz so long as the proposed orbital locations at those bands were not ones already assigned to domestic FSS licensees. AMSC claims that if we wanted to preclude its use of the 12/14 GHz band, we had ample opportunity to make our position known but, rather, we invited such a proposal in the *Allocation Reconsideration Order*.[113] AMSC also reiterates its view that it prefers the 12/14 bands because earth station equipment is readily available at reasonable cost and no coordination with terrestrial systems is required.

61. From the outset in this proceeding, we have cautioned that, although feeder link operations were to be treated as a fixed-satellite service and no separate allocation of spectrum would be made for such use, the FSS frequency bands already being used by domestic satellites may not be available to support MSS feeder links.[114] The currently used FSS bands are at 4/6 GHz and 12/14 GHz. As a matter of licensing policy, we determined that MSS feeder links, as is the case with the Radiodetermination Satellite Service (RDSS), should be at frequency bands other than those already used by domestic satellites.[115] In the *Allocation Reconsideration Order* cited by AMSC, we merely reiterated our position that a determination of which specific FSS frequency bands should be used for MSS feeder links was a licensing matter, not an allocation issue, that would have to be addressed at the time AMSC filed its joint amendment. Although we do not view this clarification as an "invitation" to the MSS applicants to apply for use of the 12/14 GHz bands, we recognize that our discussion did not discourage the MSS applicants from proposing the 12/14 GHz bands in the separate licensing proceeding. Indeed, AMSC pursued this alternative in the licensing proceeding, presenting the same arguments in support of its request as are contained in its application for review.

62. Although we do not beleve that the Bureau's letter requesting further amendments to the MSS application was a final action subject to applications for review under our rules, *see* 47 C.F.R. § 1.104, we will address AMSC's concerns. Because in its further amendment AMSC continued to pursue use of the 12/14 GHz bands for two of the proposed orbit locations and are considering that request here, as discussed below, the issues raised in its application for review remain only as to the orbit location at 101^0 W.L. The 12/14 GHz band is heavily used for domestic FSS operations, and 101^0 W.L. is a prime orbit location allowing for coverage of all fifty states. As the domestic FSS industry has expanded, we have required more efficient use of these orbit-spectrum resources, and we previously have denied applications for the currently used FSS bands (*i.e.*, 4/6 GHz, 12/14 GHz) that we found spectrally inefficient.[116] Assigning 100 MHz at 12/14 GHz at a prime orbit location for feeder link operations[117] would not be an efficient use of the available resources. AMSC's intended use also was not in accordance with our requirement that in these bands satellites employ full frequency reuse of the 500 MHz available for each orbit location.[118] Further, at the time AMSC made this request, there were numerous *bona fide* domestic FSS applications pending in a separate proceeding.[119] Given these circumstances, the Bureau acted appropriately in notifying AMSC that the application did not conform with MSS policies and in requesting that other frequency bands be proposed for the feeder links. As AMSC itself recognized in its request for expedited action, amending the feeder link frequencies would facilitate further processing of the application. Objections and petitions to deny AMSC's request to use 12/14 GHz spectrum were filed by AT&T, Contel ASC, Geostar, Arinc-ATA, COMGEN, and GTE Spacenet. These objections and petitions are now moot due to the further amendment.

63. AMSC did amend its application to request feeder links at 11/13 GHz for the satellite to be located at 101^0 W.L., and it renewed its request for feeder links at 12/14 GHz for the eastern and western orbital locations. In further amending its application, AMSC provided an analysis and evaluation of all FSS bands, including the 11/13 GHz and 12/14 GHz bands, that were available for feeder link use. Geostar and other commenters argue that AMSC's technical analysis of those bands is subjective and inconsistent and does not demonstrate conclusively that bands other than 11/13 GHz and 12/14 GHz are not acceptable alternatives. AMSC generally defends its technical analysis of available FSS bands and its evaluation of their capabilities to satisfy its perceived needs, including both cost and coordination requirements. We believe that AMSC has made good faith efforts to analyze twelve uplink and thirteen downlink bands as possible feeder link assignments. It is clear that each of the bands analyzed had both positive and negative characteristics when compared to AMSC's perception of its own technical and business needs. Rather than analyzing AMSC's motivations for making these judgments, as Geostar suggests, we believe that our efforts are better utilized in analyzing the effects of MSS feeder link operations on current users of the proposed frequency bands.

(a) *11/13 GHz Bands*

64. AMSC has requested that the satellite to be located at 101^0 W.L. be authorized to operate using the 10.70-10.95 GHz (downlink) and the 13.0-13.15/13.2-13.25 GHz (uplink) bands at one polarization for its feeder link operations. AMSC also requests a waiver of footnote NG104 in our allocation table, 47 C.F.R. § 2.106, to allow use of these frequencies by a domestic satellite system. The 11 GHz band (10.7-11.7 GHz) is allocated domestically on a co-primary basis to the fixed (terrestrial) and fixed-satellite services; the 13 GHz band (12.75-13.25 GHz) is allocated domestically to the fixed (terrestrial), fixed-satellite and mobile services. *See* 47 C.F.R. § 2.106. Domestically, these bands are currently used by the Point-to-Point Microwave Radio Service (Point-to-Point) (Part 21), the Local Television Transmission Service (LTTS) (Part 21), the Television Broadcast Auxiliary Service (TV Auxiliary) (Part 74), the Cable Television Relay Service (CARS) (Part 78), and the Private Operational Fixed Service (OFS) (Part 94). In both bands the fixed-satellite service is limited to international systems (*i.e.*, other than domestic), under footnote NG104 to the allocation table. Internationally, these and other bands were recently allocated for domestic fixed-satellite use pursuant to an allotment plan and associated procedures.[120]

65. Geostar objects to use of these bands by AMSC on several grounds. Geostar asserts that a Rule Making should be conducted to determine the best use of these allotment plan bands by the FSS and that competing applications for use of these bands should be accepted. Claiming that AMSC's proposal to use 200 MHz at one polarization is spectrally inefficient when only 500 MHz

of uplink spectrum is available under the plan, Geostar argues that we should establish technical requirements for using these allotmemt plan bands for feeder link operations, including the number and size of links available for use. In addition, Geostar asserts that AMSC has not shown that a waiver of footnote NG104 is justified because such action would undermine the footnote's very purpose, namely that the development of terrestrial services in these bands should not be hampered by large numbers of earth stations.[121]

66. Objections to use of the 13 GHz band for MSS feeder links are raised by two CARS licensees -- Jones and King -- and by NAB and NCTA. Claiming that a waiver of footnote NG104 would be tantamount to a reallocation of the spectrum, NAB and the other parties assert that only a Rule Making proceeding should determine whether this spectrum will be assigned for MSS feeder link operations. King points out that the 13 GHz band is very congested, especially in urban areas, and that MSS use of the spectrum would hamper the development of new regional cable networks and the expansion of cable service to rural areas. King also argues that, although other frequency bands are available for CARS use, the 13 GHz band is preferred for CARS operations because of the frequency's propagation characteristics and equipment availability.[122] These parties also claim that AMSC has not demonstrated that it can operate in the 13.0-13.15 GHz band without causing interference to CARS facilities. NAB also questions whether MSS operations would interfere with broadcast auxiliary services which, at times, feed transmissions for live on-air television broadcasts. NCTA questions whether coordination between the two services could be easily accomplished,[123] and NCTA and Jones urge that MSS operations not have equal status with CARS operations. Jones also suggests that actual use of the bands by the MSS be preceded by interference field trials observing mandatory coordination procedures.

67. AMSC states that it desires to use 11/13 GHz frequencies compatible with the planned Canadian MSS system. With compatible systems, there can be a joint procurement of equipment (both space and ground segments) and the two systems can serve as back-ups to each other. AMSC does not believe that a Rule Making is needed to determine whether the 11/13 GHz bands can be assigned as MSS feeder links, claiming that throughout this proceeding adequate notice has been given that fixed-satellite bands would be used for this purpose. AMSC also disputes Geostar's argument that its spectrum utilization plan is inefficient. It asserts that, by using 200 MHz at one polarization, its plan will aid coordination efforts by reducing the number of earth station uplink transmissions within or near any channel that may be used by nearby terrestrial stations. It also argues that because the same frequencies could be reused with opposite polarization by another party, its scheme would use the same amount of available frequency resource as using 100 MHz at two polarizations, as Geostar suggests. Regarding the 13 GHz band, AMSC notes that the opposing parties provide no technical analysis to support their assertions that MSS operations will cause harmful interference to CARS operations. It also believes that the MSS earth stations, which will follow the coordination procedures contained in 47 C.F.R. § 25.203, can coordinate operations successfully with CARS by using various techniques (*e.g.*, shielding) to reduce the potential for interference and by using power flux density (e.i.r.p.) limits generally lower than terrestrial microwave systems. Finally, AMSC asserts that a waiver of NG104 is justified because the limitation on domestic satellite use was originally imposed in 1973 only because of a general perception at that time that sharing between the services would be difficult.[124] Because sharing between space and terrestrial services has been effectively demonstrated in other bands, AMSC reasons that there is no need to limit domestic satellites' access to the 13 GHz band.

68. For the reasons discussed below, we will authorize AMSC to use 100 MHz at two polarizations within the frequency bands 10.70-10.95 GHz (downlink) and the 13.0-13.15/13.2-13.25 GHz (uplink) bands for feeder links for the first generation satellite to be located at 101^0 W.L.[125] We are requiring AMSC to modify its authorization at a later time to specify which 100 MHz segment in each band that it will use.[126] We also are waiving footnote NG104 in our allocation table for the requested 200 MHz segments only. These bands are to be used only for the management of the AMSS(R) and MSS operations and are not to be used to provide separate fixed-satellite services.[127]

69. The 11/13 GHz bands are allocated on a co-primary basis to the FSS, notwithstanding footnote NG104. We previously determined that we would allow the MSS feeder links on frequencies already allocated for the FSS, rather than provide a separate allocation for such use,[128] provided the FSS frequencies were not ones currently used by domestic fixed satellites.[129] Thus, the 11/13 GHz bands were legitimate options for AMSC's consideration. We also find that we need not institute a Rule Making proceeding before assigning these 11/13 GHz frequencies for limited domestic fixed-satellite use by one licensee pursuant to waiver. Also, contrary to Geostar's assertion, there is no requirement that the Commission "call for" competing applications, only that we consider all *bonafide* competing applications that are filed.[130] As discussed above, these and several other frequency bands have been allocated internationally primarily for use in meeting national FSS requirements. Continued use of these bands for international FSS systems, as provided by the U.S. domestic allocation, is problematic under the international allotment plan and associated procedures for these bands. In the U.S., heavy use of the bands by terrestrial systems makes full use of these frequencies by domestic FSS systems under the allotment plan equally problematic. Consequently, we are not proposing at this time any allocation modifications for these bands that would make these frequencies generally available for additional uses and that would be appropriately addressed in a Rule Making proceeding. Nonetheless, it is appropriate for us to consider a specific request to waive partially our allocation requirements.

70. We have an obligation to seek out the public interest in particular, individualized cases when, for example, an applicant seeking a waiver of a rule proposes a new service that will not undermine the policy served by the rule.[131] Further, we have an obligation to consider hardship, equity or more effective implementation of overall policy when evaluating waiver requests.[132] For the following reasons, we find that granting AMSC a waiver of footnote NG104 for use of these bands is in the public interest. FSS use of these bands has been restricted to international systems because the Commission believed that such systems would employ few earth stations, thereby avoiding potential interference cases between earth

stations and terrestrial networks that could unduly restrict further development of terrestrial services in these bands.[133] Of primary importance here is the fact that AMSC seeks this waiver so that it may implement a new service, MSS, and the proposed use of these 11/13 GHz frequencies for feeder link operations is generally consistent with recognized FSS use of these bands. In addition, this action allows for continued FSS use of these frequencies, consistent with the international allotment plan, while protecting the interests of current terrestrial users of these bands by limiting the waiver granted to one satellite in the first-generation MSS system. Coordination between domestic satellite and fixed services is successfully accomplished in other frequency bands, such as the 4/6 GHz bands, and also can be accomplished in the 11/13 GHz bands (*see* discussion below). A waiver will also allow the U.S. MSS system to utilize the same frequency band for feeder links as the Canadian MSS system, thereby fostering intergovernmental cooperation in implementing this new service.[134]

71. In addition, we are requiring AMSC to employ full frequency reuse of 100 MHz in each uplink and downlink segment on these frequencies. Frequency reuse results in efficient orbit and spectrum utilization. Because the international allotment plan currently allots only one orbit location for the contiguous U.S. at these frequencies, we do not want to inhibit the availability of this resource by allowing less efficient use of the spectrum.[135] AMSC's concerns regarding coordination in these bands do not override our spectrum efficiency policies.

72. As a final matter, all prospective MSS earth stations will be coordinated with terrestrial users in the 10.70-10.95 GHz, 13.0-13.15 GHz, and 13.2-13.25 GHz bands pursuant to 47 C.F.R. § 25.203. Under this requirement, earth station applicants will be using the same prior coordination procedures, *see* 47 C.F.R. § 21.100(d), as are used by the Point-to-Point, LTTS and OFS operations in the 10.7-10.95 GHz bands. In the 13.0-13.15 GHz band, CARS and TV Auxiliary operations conduct interference analyses under 47 C.F.R. §§ 78.36, 78.106, and 47 C.F.R. § 74.638, respectively. Under both the prior coordination and the interference analyses procedures, prospective applicants are required to provide interference protection to previously licensed or applied for facilities. Indeed, no party to this proceeding has demonstrated that MSS and CARS operations cannot be effectively coordinated in the 13.0-13.15 GHz band. Furthermore, because the band has been designated for co-primary use by the FSS and the fixed terrestrial services, coordination among the various categories of users has always been anticipated.

(b) ***12/14 GHz Bands***

73. AMSC proposes to operate the feeder links on its eastern and western MSS satellites in a portion of the Ku-frequency bands -- specifically, the 11.7-11.8 GHz bands for space-to-Earth transmissions and the 14.0-14.1 GHz band for Earth-to-space transmissions using two polarizations.[136] The 12/14 GHz band is allocated to the FSS and is widely used. AMSC requests that we assign its satellites to locations at the edges of the orbital arc generally assigned to fixed-satellites serving the contiguous United States and which are currently unassigned, and that we waive any restrictions on MSS use of 12/14 GHz spectrum for feeder link operations.

74. AMSC's request to use the 12/14 GHz bands for feeder link operations is opposed by two domestic fixed-satellite licensees, Contel ASC and GTE Spacenet. In addition, Geostar, an RDSS licensee, and Arinc-ATA object to AMSC's feeder link proposal. The commenters generally state that MSS satellites should not be permitted in the already-crowded 12/14 GHz orbital arc, especially when other alternative FSS bands are available for feeder link use. Geostar asserts that AMSC should be held to the same qualifying standards as other domestic fixed-satellite applicants and that its application should be processed in the context of a domestic fixed-satellite processing group.[137] It also asserts that assigning AMSC to 12/14 GHz orbital locations would reduce the Commission's flexibility to readjust orbital locations since all locations would no longer be fungible. Contel-ASC states that a Rule Making is needed before the Commission can grant AMSC's request since the provision of MSS is a nonconforming use of the 12/14 GHz band.

75. The commenters also raise several technical objections to AMSC's feeder link proposal. They argue that AMSC's proposed use of only 100 MHz of bandwidth for each of the uplink and downlink transmissions, rather than the available 500 MHz, is spectrally inefficient and would violate the Commission's technical standards for fixed-satellite operations.[138] Geostar also questions AMSC's ability to coordinate its proposed 12/14 GHz transmissions with the operations of other 12/14 GHz fixed-satellites. GTE Spacenet and Arinc-ATA complain that the AMSC must revise its initial 2^0 spacing interference analysis to conform with the new orbital locations proposed in the further amendment. GTE Spacenet urges that we place the burden of any necessary coordination with adjacent FSS satellites on AMSC.

76. We conclude that the public interest would be best served by waiving our rules to assign AMSC's eastern and western satellites to 62^0 W.L. and 139^0 W.L. and by permitting AMSC to operate its feeder links in the 11.7-11.8 GHz and 14.0-14.1 GHz frequency bands using two polarizations. These bands are to be used only for the management of the AMSS(R) and MSS operations and are not to be used to provide a separate fixed-satellite service.

77. We believe that the potential for an adverse impact on the domestic satellite industry, if any, is minimal and insufficient to jeopardize the introduction of this new mobile satellite service, with its accompanying benefits, to the public. The domestic fixed-satellite industry is well established, with four groups of authorizations granted since the first licenses were awarded in 1972.[139] Currently, nine companies are authorized to operate 12/14 GHz band satellites at a total of 23 orbital locations ranging from 64^0 W.L. to 135^0 W.L. A wide variety of fixed-satellite services, including video, data, and voice services, are being provided via the thirteen 12/14 GHz Ku-band satellites currently in-orbit and operating. Additionally, as discussed below at paragraph 78, there is adequate unused spectrum in these bands. Further, because the orbital locations sought by AMSC are "fringe" locations, assigning them to AMSC will not unduly impede our flexibility to assign or to adjust orbital locations or to administer other domestic FSS policies. The 12/14 GHz band domestic orbital arc from 64^0 W.L. to 137^0 W.L. can continue to be regulated under our established policies. Thus, permitting AMSC to use these eastern and western 12/14 GHz locations for feeder link operations should not sub-

stantially impact the number or types of services that can be made available to users by domestic fixed-satellite operators.

78. Moreover, while the commenters assert that the 12/14 GHz orbital arc is "crowded", we note that we were able to grant the applications of all qualified applicants filing as part of the most recent domestic fixed-satellite processing group, primarily because 16 of the 20 authorizations granted in the previous group were relinquished. We also note that no applicant filing in the most recent group requested 12/14 GHz orbital locations as far east or west as AMSC's proposed locations, and no applications are pending. While it may be technically possible for AMSC to operate its feeder links on other frequencies, as the commenters suggest, we will not continue to hold orbital locations at the edges of the domestic arc for fixed-satellites to the detriment of an entity who claims it can successfully use these assignments and whom we have found qualified to provide a new and needed service to the public.[140]

79. We also grant AMSC a waiver of the Commission's full frequency reuse requirement to use the 500 MHz of spectrum available at these two locations. While we are generally concerned about spectral efficiency given the limited spectrum resource, we believe that a waiver is appropriate here given AMSC's requested orbital locations. Rather than continuing to hold these "fringe" locations in abeyance until and if they are requested by domestic fixed-satellite applicants, we believe that the public interest would be better served by allowing AMSC to use 100 MHz of 12/14 GHz spectrum at each location, thereby allowing mobile satellite services to be made available in the most expeditious manner possible.[141] However, AMSC's use of these frequencies must be consistent with our technical policies for use of these bands.

80. We do not believe that AMSC's request for 12/14 GHz feeder links must be processed as part of a domestic FSS processing group, as suggested by Geostar.[142] No separate FSS services were proposed for these satellites; the feeder links are simply used in the management of the AMSS(R) and MSS operations. We also do not believe that a Rule Making is needed before assigning these frequencies for feeder link use, as suggested by Contel ASC.[143] Feeder link operations are considered a fixed-satellite service because transmissions are made to and from fixed points; thus, no reallocation is needed. Although MSS feeders were to be assigned in frequency bands not currently used by the domestic FSS, we can grant AMSC's request for these bands pursuant to waiver.

81. In addition, we do not believe it necessary to resolve issues regarding intersatellite coordination now, as several commenters urge. AMSC, as any domestic satellite operator, is required to cooperate with affected FSS operators in coordinating its operations and will have to provide revised and complete technical information to conduct coordination.[144] We believe that coordination of AMSC's feeder link operations should not pose any undue difficulties, and we will not require AMSC to provide revised 2^0 spacing interference analysis for the amended orbital locations.

C. *Network Architecture and Design*

82. The MSS network proposed by AMSC is actually a collection of semi-autonomous star networks comprised of the space stations, hub earth stations and mobile user terminals. Access to and operation of the network would be controlled by a Network Operation Center (NOC). The proposed beam coverage areas for the MSS network include the continental United States (CONUS), Alaska, Hawaii, Puerto Rico, Virgin Islands, Canada, parts of Mexico and Central America, including the Gulf of Mexico, and U.S. coastal areas up to 200 miles off-shore. Although the joint amendment provides a general description of the overall network design, AMSC has only provided the information needed to authorize the space stations. Applications for earth stations and user terminals will be filed at a later time and acted on separately. We will address the overall network design at this time, however, because the basic design parameters address the network's ability to provide generic mobile satellite services and priority and real-time preemptive access for AMSS(R) traffic, as well as other relevant issues.

83. The satellites would be designed with ten L-band spot beams, each capable of using 14 MHz of L-band spectrum in both directions of transmission with 640 watts of nominal output power to produce 60.1 dBW of e.i.r.p. Adjacent beams would not use the same frequencies, resulting in a 1.5 frequency reuse factor. AMSC envisions that the L-band beams would be comprised primarily of 5 kHz full duplex channel pairs using a single channel per carrier (SCPC) design. Aeronautical users may employ a greater or lesser amount of bandwidth per channel. All L-band circuits would connect only to feeder link circuits and could not be switched to each other on board the spacecraft. L-band to L-band communications would require a two satellite hop via a hub station.

84. There would be two types of hub earth stations for the proposed network: (a) gateway stations to interconnect telephone and other traffic to the public switched telephone network (PSTN), and (b) base stations to terminate private network traffic at dispatch centers or monitoring and control sites. All hubs would have full duplex feeder links to the space stations, use frequency agile channel modems to communicate with the mobile terminals, and use the back-haul FSS transponder to communicate with the NOC.

85. AMSC is planning for three classes of user terminals: (a) mobile/omni -- low cost units with omnidirectional antennas having antenna gain of 0-4 dBi and transmit power of 10 W; (b) mobile/steered -- higher cost units with steerable antennas having antenna gain of 12 dBi and transmit power of 2 W; and (c) transportable -- low cost units using steerable antennas having antenna gain of 15 dBi and transmit power 1 W. All user terminals would be capable of voice or data transmissions, connect to their respective hub stations, and share a pool of channels under the control of a Priority Demand Assignment Multiple Access (PDAMA). Although MSS modulation standards will have to be developed in cooperation with equipment manufacturers, the user terminals may use amplitude companding single side band (ACSB) for voice communications and a variety of digital formats. AMSC proposes that the aeronautical terminals have a core capability that meets the minimum standards established by the International Civil Aviation Organization (ICAO) and its special committee on Future Air Navigation Systems (FANS).[145] The core capability provides that: (a) all communications, including voice, use a digital format, (b) a two-way 600 bps data link is used for ATC, (c) the RF interface minimum is capable of a G/T of -26 dB K and antenna gain of 0 dBi, and (d) Doppler

compensation is used, including oscillator stability equal to or better than one part in 10^7. The AMSC acknowledges that ICAO is studying higher standards (*e.g.*, Characteristic 741) that could be included in the system design.

86. In addition to performing the TT&C functions for the satellites, AMSC proposes that the NOC would control all access to and operation of the network using a PDAMA processor system. The PDAMA would monitor and assign channels for use by all network traffic. The system would be designed to recognize levels of message priority, including the scheme used for AMSS(R) as provided by Article 51 of the international Radio Regulations. Specialized PDAMA processors and software may be developed to serve private networks, such as the aviation community and AMSS(R) communications.[146] Various administrative and management functions also would be incorporated in the NOC design. The NOC would be designed to complement Canada's planned MSS system so that the two systems could share access to the L-band spectrum (*e.g.*, the PDAMA capability would apply equally to both systems) and could serve as in-orbit backups to each other.

87. Arinc-ATA claim that AMSC has not provided all of the Appendix B application information required by the Commission[147] and that the network design is not sufficient to meet the needs of the aviation community for AMSS(R) or other aeronautical services. Arinc-ATA cite the network's inadequate coverage of ocean areas where aviation has the greatest need for a satellite-based communications system. Arinc-ATA also claim that the capacity proposed for AMSS(R) use is not adequate. They allege that the demand projections for aeronautical services are too low and that the basic SCPC transmission design is not suited to AMSS(R) use. They also argue that the proposed three satellites would be spaced too closely and could not achieve adequate signal discrimination and the number of channels needed for aviation use. Arinc-ATA also allege that the proposed system as designed cannot provide instantaneous access for AMSS(R) traffic (*e.g.*, call set-up time, blocking rates), that there is no established priority system for all aeronautical traffic to follow, and that more efficient aeronautical system characteristics (*e.g.*, link budgets and margins, Characteristic 741) are not specified. Arinc-ATA also object that allowing the general public to use mobile units designed for the same, or adjacent, frequencies as AMSS(R) communications will increase the potential for interference to AMSS(R) traffic.

88. In response, AMSC claims that it has provided all Appendix B information that is relevant to its application. Concerning the sufficiency of the network design for AMSS(R) use, AMSC claims that it has provided all Appendix B information that is relevant to its application. AMSC alleges that the aviation community can design its own subsystem on frequencies that can be set aside for AMSS(R) use and can decide what characteristics to incorporate. AMSC also notes that the satellites would be designed with wideband linear channels that can carry any channel width and data rate within the transponder's limits, thus aviation would not be limited to using the 5 kHz channels described for mobile telephone use. Further, the NOC would be designed to ensure interoperability between a separate AMSS(R) system and the rest of the network. In further comments, Arinc-ATA question how the PDAMA can ensure priority and preemptive access if different system characteristics (*e.g.*, Time Division Multiple Access (TDMA) modulation for AMSS(R)) are used throughout the network.

89. The FAA requests that we require AMSC to follow certain protocols in planning and implementing a network design in order to ensure access and protection for AMSS(R) transmissions. These protocols concern system design characteristics and approach, system operational capabilities, and system aging considerations.[148] For example, the FAA suggests that non-interference to AMSS(R) be demonstrated operationally and general mobile terminal access to AMSS(R) frequencies be restricted pending successful conclusion of an operational test period for a completed MSS system. Arinc-ATA share these concerns.

90. Initially, we observe that all of the comments regarding system design raise issues concerning the system's ability to provide AMSS(R) and to protect the integrity of those communications. In the *Second Report and Order*, we deferred adopting technical or operating standards for the MSS system. We found that the applicants were best qualified to specify the initial system design striking a balance among cost, efficiency and allocation requirements.[149] We cautioned the applicants, though, that any MSS system must be technically capable of providing AMSS(R) access and that technical requirements to ensure such access may need to be specified at a later date.[150] Our concerns stemmed not only from the need to meet the technical requirements for AMSS(R) but also from the need to provide interference protection for AMSS(R) communications. We find that the overall system design proposed by AMSC, whereby access to and operation of the network will be controlled primarily by the NOC and the PDAMA system rather than by incorporating control mechanisms on the spacecraft itself, is a reasonable approach for a combined MSS-AMSS(R) system. The application does not adequately describe, though, how AMSS(R) access and interference protection will be ensured. We recognize that, to a large extent, this omission reflects the ongoing dialogue within the domestic and international aviation communities to develop technical standards for aeronautical satellite communication systems.[151] Given these circumstances, we would be remiss in meeting our responsibility to promote the safety of life and property through the use of radiocommunications, *see e.g.*, 47 U.S.C. § 151, if we do not continue to oversee the planning and implementation process of a generic MSS-AMSS(R) system.

91. Some of the concerns raised by Arinc involve AMSC's failure to provide or to revise certain technical information as it further amended its application. Because it is not uncommon for satellite licensees to modify the system design, we often entertain requests for technical changes after a license is granted.[152] We have sufficient information to allow us to make a public interest determination on AMSC's application at this time, and all other required technical information may be submitted at a later date. We will consider the later technical filings as a request to modify the MSS system license. Specifically, we will require the AMSC to file the following information within 120 days of release of this order:[153]

(a) *Feeder link spacecraft antenna coverage patterns:* for both the 11/13 GHz and the 12/14 GHz bands, revise the spacecraft transmit and receive antenna

coverage patterns for all three satellite locations; maximum transmit power and maximum e.i.r.p. for each beam; and G/T for each receive antenna beam;

(b) *Transponder plan:* revise the L-to-Ku bands and Ku-to-L bands frequency plans for all three satellites; polarization for each direction of transmission; TT&C frequency; and the back-haul frequency and polarization plans between the NOC and the hub stations;

(c) *Link budgets:* revise for all authorized services, including AMSS(R), in the L-band, 11/13 GHz and 12/14 GHz bands.[154]

We also require AMSC to provide at the same time additional information on the specific functions that will be performed by the NOC and by the PDAMA systems. This information should clarify the interrelationship between these components, especially concerning AMSS(R) priority and real-time preemptive access within the network and interference control mechanisms, and to clarify the interrelationship between the NOC-PDAMA components and the mobile terminals. Once the system information is complete, we believe that AMSC can proceed to finalize the spacecraft construction contract, even though further design details regarding the NOC, PDAMA, earth stations and mobile terminals will have to be developed.

92. As the system design is defined, we believe it is essential for AMSC to participate actively in international meetings and in the Radio Technical Commission for Aeronautics (RTCA) Special Committee 165 (SC-165),[155] which is sponsored by the FAA and has responsibility for developing guidelines concerning all aspects of AMSS(R). We also recognize that the FAA, which has regulatory responsibility for air safety in the U.S., promulgates rules governing aviation safety operations in the U.S. We expect that the FAA would promulgate rules governing AMSS(R) system operation and certification to ensure interference protection for AMSS(R) communications. In this regard, we strongly urge AMSC to maintain a dialogue with the FAA to facilitate development of the MSS-AMSS(R) system. It is essential that the aviation community act expeditiously to finalize reasonable and necessary technical requirements and system specifications for AMSS(R) communications in order not to delay the construction of the satellites and the offering of mobile satellite services to the public. We recognize that AMSS(R) technical requirements may change after construction the first generation satellites begin; such changes may have to be incorporated on second generation systems. We intend to monitor closely these activities. We will require AMSC to provide a report within ten months of the release of this order that identifies any issues or problems concerning reasonable and necessary AMSS(R) technical requirements and system specifications that may need to be addressed by the Commission. AMSC must serve a copy of this report on RTCA and the FAA, which are invited to provide comments to the Commission. As the licensee, AMSC is responsible for overall system design, even though third parties will be allowed to apply to operate their own earth stations and mobile terminals as semi-autonomous networks within the system.[156]

93. We believe that Arinc-ATA's and the FAA's concerns will be addressed as the implementation process for the MSS system continues. Many of the requirements cited by Arinc-ATA – link budgets, call set-up times, priority schemes, Characteristic 741 – can be included in other components of the network since their operations are not totally determined by the spacecraft's design. In this regard, we expect aeronautical communications to follow, at a minimum, the priority scheme contained in Article 51 of the international Radio Regulations,[157] whereas priority between AMSS(R) and general mobile traffic will be consistent with the allocation requirements. Arinc-ATA's concerns about the incompatibility of SCPC and TDMA transmission characteristics seem misplaced because there is not an internationally agreed single modulation scheme for aeronautical services at this time.[158] Similarly, Arinc-ATA's concerns about the system's capability to provide adequate capacity for AMSS(R) needs vis-a-vis demand projections and satellite orbital spacings are also misplaced. At this time, there is no general agreement on demand projections for AMSS(R), and existing projections are largely speculative.[159] In addition, use of the MSS system and L-band frequency by the general public should not interfere with AMSS(R) users in a system where all access to the network will be centrally controlled. Further, we expect that AMSC will design the system to avoid co-channel, adjacent channel and adjacent beam interference problems.

94. We also require AMSC to incorporate into the overall system design whatever minimum requirements for aeronautical satellite communications systems are endorsed internationally through ICAO.[160] We also require AMSC to establish appropriate arrangements for handing off aeronautical traffic between its system and others, such as Canada's and INMARSAT's.[161] These requirements will enable the U.S. MSS system to be interoperable with other countries' and international systems and will maintain the integrity of AMSS(R) communications internationally and domestically.

(1) *Beam Coverage and Service Areas*

95. AMSC proposes in its application to provide service to the U.S. domestic market, including CONUS, Alaska, Hawaii, Puerto Rico, the Virgin Islands and U.S. coastal areas up to 200 miles off-shore. On the other hand, the beam coverage patterns included in the application cover all of North America, including Canada and Mexico, but do not cover Hawaii, Puerto Rico or the Virgin Islands. AMSC does not request authority to provide service to Canada and Mexico.

96. Several commenters note the application's inconsistencies between the proposed coverage and service areas. Arinc-ATA also object to the lack of ocean coverage by the proposed system, claiming that the coverage is insufficient to meet aeronautical needs for international flights and some North American air routes. AMSC replies that it did not propose coverage of ocean areas, including Hawaii, because it is primarily a U.S. domestic system and that those areas can be served by proposed international systems, such as INMARSAT's.

97. Because this is the sole MSS-AMSS(R) satellite system to be authorized at this time for domestic communications, we find that it is in the public interest to require AMSC to provide service to all of the U.S. domestic market, including all fifty states, Puerto Rico, the Virgin Islands and U.S. coastal areas up to 200 miles.[162] All of these locations are visible from both the 101^0 W.L. and 139^0 W.L. orbit locations. Accordingly, AMSC is required to provide, within 120 days of release of this

order, revised spacecraft antenna beam patterns to include, as follows: (a) at 62^0 W.L., Puerto Rico and the Virgin Islands, (b) at 101^0 W.L., Hawaii, Puerto Rico and the Virgin Islands, and (c) at 139^0 W.L., Hawaii, Puerto Rico and the Virgin Islands.

98. We also allow AMSC to proceed at its own risk with plans to include Canada and Mexico within the satellites' coverage areas. However, we are not hereby granting AMSC any authority to provide service to Canada and Mexico. If such service is desired, it must be requested under a separate application. In its application, AMSC describes efforts with Canada to develop for each country systems with mutual sharing, back-up and restoration capability. AMSC also claims to be pursuing discussions with Mexico regarding MSS service to that country. Although there is no record in this proceeding of any agreements between AMSC and Canadian or Mexican entities, we find that it is in the public interest to allow AMSC to design its system to provide geographical coverage of these areas at this time. Throughout this proceeding, we have discussed the possibility of a regional North American or a joint U.S.-Canada MSS system and have cited the potential benefits of shared development costs and back-up and restoration capability.[163]

99. Finally, we do not require AMSC to expand its system's coverage of ocean areas, as suggested by Arinc-ATA. Aeronautical service needs in these areas can be met by international systems, such as INMARSAT's, with hand-offs of domestic traffic from the U.S. system to other aeronautical systems, as needed.

(2) *Earth Stations and Mobile Terminals*

100. As we indicated above, AMSC's application does not request authority for hub earth stations or mobile user terminals. Both types of facilities will be licensed under separate applications. Nonetheless, given that AMSC will be developing a combined MSS-AMSS(R) system and our requirement that the system design be further defined, it is appropriate to provide some guidance on planning for and licensing of the earth stations and mobile terminals for the network.

101. Initially, earth station and mobile terminal design will reflect overall system requirements and characteristics. Because of the various types of services proposed for the system and the need to provide AMSS(R) with priority and real-time preemptive access as well as interference protection, we expect that these facilities will have certain unique characteristics that may require special licensing procedures. In order to facilitate this process, AMSC should provide preliminary plans for earth station and mobile terminal design when it provides the information discussed at paragraph 92. This will assist us in evaluating overall system integrity and in determining what special application requirements or licensing procedures, if any, may be needed for these facilities, and whether technical standards for these facilities need to be established.

102. At this time, we anticipate that the hub earth stations will be licensed under Part 25 of the Commissions rules. Mobile terminals to be located on aircraft, which may be used for both AMSS(R) and MSS (*e.g.*, APC) traffic, will be type accepted and licensed under Part 87 of the Commission's rules, *see, e.g.*, 47 C.F.R. § 87.147. This may require the development of technical standards for such equipment. Mobile terminals for non-AMSS(R) use may be authorized by a blanket license, as indicated in the *Second Report and Order*, or under alternate procedures, depending on overall system design and implementation of the various mobile services. Applications for mobile terminals would be provided to the FAA for comment.[164]

D. *International Coordination*

103. Two parties question AMSC's ability to coordinate successfully its proposed L-band operations. Arinc-ATA claim that if the AMSC's L-band use does not conform with the new international allocation for the band, it will not be able to coordinate its network under ITU procedures.[165] Arinc-ATA claim, for example, that AMSC will not be able to coordinate and protect any LMSS traffic in the lower band segment, which the ITU has allocated only to AMSS(R), because other administrations do not have to protect non-conforming uses. The petitioners also argue that, under ITU procedures, AMSC must accommodate on a priority basis all AMSS(R) traffic on any other system using those frequencies, not only AMSS(R) traffic within its own network. Arinc-ATA also allege that the U.S. domestic allocation, which does not conform with either the current or the new international allocation, is unlawful and cannot be rendered legitimate by the U.S. protocol statement to the 1987 Mobile WARC decisions wherein the U.S. reserved the right to use these bands in the way most appropriate to satisfy its mobile satellite service needs. In response, AMSC argues that because it must provide AMSS(R) priority access across the whole band, it will be able to satisfy the ITU allocation and coordination requirements. Geostar supports AMSC's position by urging a flexible interpretation of international coordination requirements.

104. We do not share Arinc-ATA's view that implementation of the U.S. domestic allocation will preclude successful completion of the ITU coordination process for AMSC's proposed network. Arinc-ATA raise here the same arguments on this issue that they raised in their petition for further reconsideration of our allocation decision. We have fully addressed their arguments in that proceeding,[166] and we will not repeat the discussion here.

105. Comsat asserts that coordination will be difficult with three satellites that INMARSAT plans to implement in its Atlantic and Pacific Ocean Regions and that will be using the lower L-band segments at 1545-1548/1646.5-1651 MHz for AMSS(R). Comsat alleges that co-channel operation at these frequencies will not be possible because of INMARSAT's planned use of omnidirectional, low to mid gain antennas. Consequently, Comsat suggests that AMSC not operate any traffic on these frequencies. Comsat also suggests that AMSC not carry any LMSS traffic on these frequencies because such use would not be entitled to interference protection under the ITU's new allocation and coordination of such traffic with INMARSAT is not probable. Comsat and Arinc-ATA claim that AMSC's technical analysis is incomplete and does not demonstrate that coordination can be successfully accomplished. AMSC responds that it can modify the coordination data sent to the ITU and affected parties, as needed.

106. Although we appreciate Comsat's concern regarding the coordination process, we believe that we should not prejudge the outcome of this dynamic process. Numerous techniques and options are available for avoiding interference between satellite networks,[167] and we expect that these will be explored in coordinating the AMSC's network with other AMSS(R) and MSS networks. In addi-

tion, we are requiring AMSC to provide the Commission with all information necessary for the advance publication, coordination and notification of frequency assignments under the ITU and INTELSAT procedures, consistent with 47 C.F.R. § 25.202 (c), and under the INMARSAT Convention.

107. Comsat also states that AMSC will have to comply with the consultation processes under Article 8 of the INMARSAT Convention for its proposed maritime services and under Article 14 (c) and (e) of the INTELSAT Agreement. Article 8 of the INMARSAT Convention sets forth the particular rights and obligations of the parties to that agreement. Subpart (1) of Article 8 states:

> A Party shall notify the Organization in the event that it or any person within its jurisdiction intends to make provision for, or initiate the use of, individually or jointly, separate space segment facilities to meet any or all purposes of the INMARSAT space segment, to ensure technical compatibility and to avoid significant economic harm to the INMARSAT system.

The purposes of INMARSAT, as stated in Article 3 of the Convention, are:

> . . . to make provision for the space segment necessary for improving maritime communications, thereby assisting in improving communications for distress and safety of life at sea communications, efficiency and management of ships, maritime public correspondence and radiodetermination capabilities.

We find that AMSC will have to consult its proposed maritime, but not its other, operations with INMARSAT.

108. Article XIV (c) of the INTELSAT Agreement requires that a party to the Agreement engage in a technical consultation with INTELSAT when it intends to use space segment facilities separate from INTELSAT's space segment facilities to provide domestic public telecommunications services. AMSC's proposed service within U.S. coastal areas up to 200 miles off-shore involves Article XIV (d) which requires that a party to the Agreement engage in a technical and economic consultation with INTELSAT when it intends to use space segment facilities separate from INTELSAT's to provide international public telecommunications services. Article XIV (e) of the INTELSAT Agreement requires that a party to the Agreement engage in a technical consultation with INTELSAT when it intends to use space segment facilities separate from INTELSAT's space segment facilities to provide specialized telecommunications services, either domestic or international. Under Article I (k) and (l) of the INTELSAT Agreement, specialized telecommunications services are those other than telecommunications services available for use by the public and include, but are not limited to, radio navigation services. We find that AMSC will have to consult its proposed services under Article XIV of the INTELSAT Agreement.

E. *Miscellaneous Issues*

(1) *Rates for AMSS(R) Users*

109. Arinc-ATA allege that AMSC intends to charge a premium for AMSS(R) priority and preemptive access. They argue that this is unfair because the aviation community has a legal right to such access and would have little difficulty obtaining it on a dedicated aeronautical system. In response, AMSC claims that it is reasonable to consider preemptability in establishing rates and that, in other cases, the Commission has approved tariffs charging either a premium for the ability to preempt or a discount for being subject to preemption. AMSC further claims that although the service rates that it does establish may be based on marketplace mechanisms that will permit the system to be used efficiently, they will be just and reasonable. Because AMSC will be monopoly provider of mobile satellite services, Arinc-ATA question AMSC's claim that AMSC can rely on marketplace forces to establish just and reasonable rates. Arinc-ATA also question the extent to which either market or monopoly forces should influence the pricing and availability of a public safety service.

110. In the *Second Report and Order*, we determined that the MSS licensee would be regulated as a common carrier under streamlined regulatory procedures.[168] Under streamlined procedures, carriers can file tariffs on fourteen days notice with no cost support data, and the tariffs are presumed lawful.[169] Nonetheless, parties can petition for suspension of the proposed tariffs under Section 1.773 (a) (ii) of the Commission's rules, 47 C.F.R. § 1.773 (a) (ii). These procedures would apply to all tariffs proposed by AMSC, including those for AMSS(R). When AMSC does propose tariffs for AMSS(R), the aviation entities should raise their concerns, if any, in response to the specific rate proposals presented at that time.

111. We remind AMSC that, as a common carrier, all of its charges, practices, classifications and regulations must be just and reasonable, pursuant to Section 201 of the Communications Act of 1934, 47 U.S.C. § 201. In this case, AMSC should consider the public safety nature of the service involved and the public interest in having the service made available. Finally, we reiterate the position we adopted in the *Second Report and Order*, and we reserve the right to review the regulatory classification for MSS and to impose more or less stringent oversight for the various service offerings, including AMSS(R), after the system is in operation.[170]

(2) *Interim Service*

112. Citing the joint operating agreement and its failure to disclose fully AMSC's plans to provide MSS on an interim basis pending completion of its dedicated satellite system, Geostar avers that any authorization for interim service must be applied for separately and subject to notice and comment. Geostar adds that it opposes use of INMARSAT capacity in the maritime bands for interim MSS use, claiming that the Commission would first need to conduct a Rule Making on whether INMARSAT capacity could be used for U.S. domestic service. Geostar also argues that interim MSS use of the maritime bands would cause technical and economic harm to Geostar's plans to use those bands for digital land mobile satellite service (DLMSS) and that the Commission should act on

Geostar's pending DLMSS application concurrently with AMSC's application, providing for competition in the MSS.[171]

113. AMSC acknowledges that if it intends to provide MSS on an interim basis, it will apply separately to do so. Comsat notes that AMSC's application does not propose to provide MSS on the INMARSAT system and that it believes it is premature to commence a Rule Making proceeding on using INMARSAT capacity for U.S. domestic MSS use. Geostar replies that a Rule Making would provide a full opportunity for comment on the terms and conditions for using INMARSAT capacity and, in addition, that an orderly transition could be established if the Commission adopts Geostar's proposal for reverse-band operations in the maritime bands.

114. We believe that Geostar's concerns are misplaced. The application before us does not seek authority to provide interim service, and AMSC acknowledges that such authority must be separately sought and granted. The provision of MSS on an interim basis may take several forms, including use of other frequencies, use of excess capacity on other operational systems or deployment of a MSS payload on a host fixed-satellite. As Geostar itself is aware as a provider of RDSS on an interim basis, [172] we are willing to explore a licensee's options for interim service when applications are filed seeking such authority and are subject to public notice and comment.

115. Further, we have already determined that competition in the MSS can be achieved by the open access requirement established for the first generation system that we are authorizing in the 1545-1559/1646.5-1660.5 MHz bands, and that competition is not dependent on authorizing more than one system initially.[173] It would not be in the public interest to delay action on AMSC's application and the introduction of new services until we act on Geostar's petition and application for DLMSS in the maritime bands. The two are unrelated and, as AMSC's application is the result of a very long proceeding, it is reasonable to act on its application first.

(3) ***Milestone Schedules***

116. For the three proposed satellites, AMSC requests the following implementation schedule:

Satellite	Begin Construction	End Construction	Launch
No. 1	Yr. 2 (mid)	Yr. 4 (end)	Yr. 5 (begin)
No. 2	Yr. 5 (begin)	Yr. 7 (end)	Yr. 8 (begin)
No. 3	Yr. 6 (mid)	Yr. 8 (end)	Yr. 9 (begin)

(Note: The milestone dates are referenced to the year when the license is granted, which is Yr. 1- the first year of the license term.)

The joint amendment states that AMSC will begin operations with one satellite located at the center of the U.S. service arc and that the two additional satellites will be placed in eastern and western orbital locations when growth in traffic requires system expansion.

117. The implementation schedules proposed for the second and third satellites are longer than those authorized for use in the domestic FSS, which range from one to five years per satellite,[174] and in the RDSS, which range from one to six years for the complete network.[175] The only justification offered for AMSC's lengthy implementation schedules is the possibility of growth in traffic. Indeed, AMSC does not propose to begin construction on a second satellite until the first one is launched, which is approximately five years after the authorization is granted.

118. As evidenced by the policies developed for domestic fixed-satellites and radiodetermination satellites, the milestone schedule included in each domestic satellite license is designed to ensure that licensed entities are proceeding with construction and launch of their systems in a timely manner. Requiring licensees to adhere to a milestone schedule prevents orbital locations from being held by licensees who have not decided whether to proceed with their plans or who do not intend to implement their satellites for many years. Such indecision would interfere with the efficient assignment of orbital locations, would frustrate the international coordination process,[176] and could hinder the availability of services to the public by blocking the entry of other entities willing and able to proceed immediately with construction and launch of their systems.

119. In this case, our determination of a reasonable implementation schedule for the second and third satellites also must take into account that these satellites are being assigned to use 12/14 GHz frequencies and orbital locations that are allocated to the domestic FSS. Milestone schedules that far exceed the five year limit used in the domestic FSS would seriously curtail the potential availability of these assignments for domestic FSS applicants in the future, without sufficient assurance that AMSC will use these assignments.

120. Accordingly, we set forth in detail below, the milestone schedule that we require AMSC to follow in implementing its MSS system in order to conform to our general policies governing construction and launch of satellites. AMSC will be required to begin construction on each approved satellite within two years of grant and to launch each satellite within five years of grant.

IV. ORDERING CLAUSES

121. We find, pursuant to Section 309 of the Communications Act of 1934, 47 U.S.C. § 309, that grant of these applications will serve the public interest, convenience and necessity. We also find, pursuant to Section 308 of the Communications Act, 47 U.S.C. § 308, that Hughes Communications Mobile Satellite, Inc., MCCA American Satellite Service Corporation, McCaw Space Technolgies, Inc., Mobile Satellite Corporation, North American Mobile Satellite, Inc., Satellite Mobile Telephone Co., Skylink Corporation, And Transit Communications, Inc. d/b/a American Mobile Satellite Corporation are legally and technically qualified to construct, launch and operate the proposed satellites. We also find that these eight applicants are financially qualified on the condition that they individually complete a minimum $5 million cash stock investment in American Mobile Satellite Corporation, as discussed above at paras. 29-30.

122. Accordingly, IT IS ORDERED that the application of Hughes Communications Mobile Satellite, Inc., as amended (File No. 1629-DSS-P/L-85), IS GRANTED, and Hughes Communications Mobile Satellite, Inc. IS AUTHORIZED to participate in American Mobile Satellite Corporation provided it certifies in writing to the Commission, within 60 days of the release of this order, that it

has completed a $5 million cash stock investment in American Mobile Satellite Corporation consistent with the terms of this order. IT IS FURTHER ORDERED that if Hughes Communications Mobile Satellite, Inc. fails to provide this certification, as ordered, this authorization shall automatically become null and void.

123. IT IS FURTHER ORDERED that the applications of MCCA American Satellite Service Corporation, as amended (File Nos. 1630-DSS-P/L-85 and 1631-DSS-P-85), ARE GRANTED, and MCCA American Satellite Service Corporation, IS AUTHORIZED to participate in American Mobile Satellite Corporation provided it certifies in writing to the Commission, within 60 days of the release of this order, that it has completed a $5 million cash stock investment in American Mobile Satellite Corporation consistent with the terms of this order. IT IS FURTHER ORDERED that if MCCA American Satellite Service Corporation fails to provide this certification, as ordered, this authorization shall automatically become null and void.

124. IT IS FURTHER ORDERED that the application of McCaw Space Technolgies, Inc., as amended (File No. 1632-DSS-P-85), IS GRANTED, and McCaw Space Technologies, Inc. IS AUTHORIZED to participate in American Mobile Satellite Corporation provided it certifies in writing to the Commission, within 60 days of the release of this order, that it has completed a $5 million cash stock investment in American Mobile Satellite Corporation consistent with the terms of this order. IT IS FURTHER ORDERED that if McCaw Space Technolgies, Inc. fails to provide this certification, as ordered, this authorization shall automatically become null and void.

125. IT IS FURTHER ORDERED that the applications of Mobile Satellite Corporation, as amended (File Nos. 1633/1634-DSS-P/L-85, 1635-DSS-P-85), ARE GRANTED, and Mobile Satellite Corporation IS AUTHORIZED to participate in American Mobile Satellite Corporation provided it certifies in writing to the Commission, within 60 days of the release of this order, that it has completed a $5 million cash stock investment in American Mobile Satellite Corporation consistent with the terms of this order. IT IS FURTHER ORDERED that if Mobile Satellite Corporation fails to provide this certification, as ordered, this authorization shall automatically become null and void.

126. IT IS FURTHER ORDERED that the applications of North American Mobile Satellite, Inc., as amended (File Nos. 1639-DSS-P/L-85, 1640-DSS-P-85), ARE GRANTED, and North American Mobile Satellite, Inc. IS AUTHORIZED to participate in American Mobile Satellite Corporation provided it certifies in writing to the Commission, within 60 days of the release of this order, that it has completed a $5 million cash stock investment in American Mobile Satellite Corporation consistent with the terms of this order. IT IS FURTHER ORDERED that if North American Mobile Satellite, Inc. fails to provide this certification, as ordered, this authorization shall automatically become null and void.

127. IT IS FURTHER ORDERED that the applications of Satellite Mobile Telephone Co., as amended (File Nos. 1646/1647-DSS-P/L-85), ARE GRANTED, and Satellite Mobile Telephone Co. IS AUTHORIZED to participate in American Mobile Satellite Corporation provided it certifies in writing to the Commission, within 60 days of the release of this order, that it has completed a $5 million cash stock investment in American Mobile Satellite Corporation consistent with the terms of this order. IT IS FURTHER ORDERED that if Satellite Mobile Telephone Co. fails to provide this certification, as ordered, this authorization shall automatically become null and void.

128. IT IS FURTHER ORDERED that the applications of Skylink Corporation, as amended (File Nos. 1648/1649-DSS-P/L-85), ARE GRANTED, and Skylink Corporation IS AUTHORIZED to participate in American Mobile Satellite Corporation provided it certifies in writing to the Commission, within 60 days of the release of this order, that it has completed a $5 million cash stock investment in American Mobile Satellite Corporation consistent with the terms of this order. IT IS FURTHER ORDERED that if Skylink Corporation fails to provide this certification, as ordered, this authorization shall automatically become null and void.

129. IT IS FURTHER ORDERED that the applications of Transit Communications, Inc., as amended (File Nos. 1650/1651-DSS-P/L-85, 1652-DSS-P-85), ARE GRANTED, and Transit Communications, Inc. IS AUTHORIZED to participate in American Mobile Satellite Corporation provided it certifies in writing to the Commission, within 60 days of the release of this order, that it has completed a $5 million cash stock investment in American Mobile Satellite Corporation consistent with the terms of this order. IT IS FURTHER ORDERED that if Transit Communications, Inc. fails to provide this certification, as ordered, this authorization shall automatically become null and void.

130. IT IS FURTHER ORDERED that American Mobile Satellite Corporation IS AUTHORIZED to construct domestic mobile satellites in accordance with the terms, conditions and technical specifications set forth in the applications, as amended, and as further modified by the terms and conditions of this order.

131. IT IS FURTHER ORDERED that American Mobile Satellite Corporation IS AUTHORIZED to launch and operate three space stations in the mobile satellite service at 62^0 W.L., 101^0 W.L. and 139^0 W.L. in accordance with the relevant terms and conditions of this order, as well as the relevant terms and conditions of all previous orders and authorizations in General Docket No. 84-1234 concerning the operation of MSS space stations.

132. IT IS FURTHER ORDERED that American Mobile Satellite Corporation, within 70 days of the release of this order, certify in writing to the Commission whether Hughes Communications Mobile Satellite, Inc., MCCA American Satellite Service Corporation, McCaw Space Technologies, Inc., Mobile Satellite Corpoation, North American Mobile Satellite, Inc., Satellite Mobile Telephone Co., Skylink Corporation, and Transit Communications, Inc. have satisfied the investment requirement ordered herein.

133. IT IS FURTHER ORDERED that American Mobile Satellite Corporation, within 120 days of the release of this order, file with the Commission the following information consistent with the terms of this order: (a) revised feeder link spacecraft antenna coverage patterns; (b) revised transponder plan; (c) revised link budgets; (d) descriptions of NOC, PDAMA, and mobile terminal interrelationships; (e) revised spacecraft beam coverage patterns; (f) identification of the 100 MHz segments (uplink and downlink) at 11/13 GHz to be used for feeder links at 101^0 W.L.; and (g) preliminary plans for earth station and mobile terminal design.

134. IT IS FURTHER ORDERED that American Mobile Satellite Corporation within ten months of the release of this order, file with the Commission a report that identifies any issues or problems concerning reasonable and necessary AMSS(R) technical requirements and system specifications, as discussed at paragraph 92.

135. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, each of the authorizations shall become null and void in the event the space stations are not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of the authorization by the following dates, as certified in writing to the Commission by the licensee:

	Construction Commenced	Construction Completed	Launched
AMSC-1	July 1990	January 1993	July 1993
AMSC-2	July 1991	January 1994	July 1994
AMSC-3	July 1991	January 1994	July 1994

136. IT IS FURTHER ORDERED that the license term for the space stations is ten years and will begin to run on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and the operations fully conform to the terms and conditions of this authorization.

137. IT IS FURTHER ORDERED that American Mobile Satellite Corporation, as required by Section 25.202(c) of the Commission's rules, 47 C.F.R. § 25.202(c), will prepare the necessary submissions to the International Telecommunication Union for advance publication, international coordination and notification of these space stations in accordance with the international Radio Regulations and for consultation in accordance with Article XIV of the INTELSAT Agreement and with Article 8 of the INMARSAT Convention as requested by the Commission.

138. IT IS FURTHER ORDERED that American Mobile Satellite Corporation IS CONDITIONALLY AUTHORIZED to operate in U.S. coastal areas up to 200 miles subject to the Department of State informing the Commission that the U.S. has fulfilled its obligations under both Article XIV (d) and (e) of the INTELSAT Agreement and Article 8 of the INMARSAT Convention and that the Commission may proceed with final authorization for operations in U.S. coastal areas up to 200 miles.

139. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to American Mobile Satellite Corporation is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to use the orbit and spectrum. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of the corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity will be served thereby.

140. IT IS FURTHER ORDERED that petitions to deny filed by Aeronautical Radio, Inc.-Air Transport Association of America, GTE Spacenet Corporation, and Globesat Express ARE DENIED and that the petitions of Mobile Satellite Service, Inc. ARE DENIED IN PART and otherwise DISMISSED AS MOOT.

141. IT IS FURTHER ORDERED that the motion to accept supplemental commental filed by Aeronautical Radio, Inc.-Air Transport Association of America IS GRANTED.

142. IT IS FURTHER ORDERED that the petition for reconsideration filed by Hughes Communications Mobile Satellite, Inc. IS DENIED.

143. IT IS FURTHER ORDERED that American Mobile Satellite Service Corporation's application for review IS GRANTED IN PART and DENIED IN PART, consistent with the terms of this order.

144. IT IS FURTHER ORDERED that the motion to accept late-filed comments by the National Academy of Science, Committee on Radio Frequency IS GRANTED.

145. IT IS FURTHER ORDERED that these actions are effective upon adoption.

146. American Mobile Satellite Corporation is afforded 30 days from the date of release of this order and authorization to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] A mobile satellite service is a radio communication service between mobile earth stations and one or more space stations. *See* 47 C.F.R. § 2.1.

[2] The applicants who comprise AMSC are Hughes Communications Mobile Satellite Services, Inc. (Hughes); MCCA American Satellite Service Corporation (MCCA); McCaw Space Technologies, Inc. (McCaw); Mobile Satellite Corporation (Mobilesat); North American Mobile Satellite, Inc. (NAMS); Satellite Mobile Telephone Co. (SMTC); Skylink Corporation (Skylink); and Transit Communications, Inc. (TCI).

[3] 50 Fed. Reg. 8149 (February 28, 1985).

[4] In addition to the eight applicants who comprise AMSC, applications were filed by Global Land Mobile Satellite, Inc. (Global); Globesat Express (Globesat); Mobile Satellite Service, Inc. (MSSI); and Omninet Corporation (Omninet). Omninet later withdrew its application. The Common Carrier Bureau dismissed the applications of Global, Globesat and MSSI, *see infra* para. 9.

[5] *See* Report and Order, General Docket Nos. 84-1231, 84-1233 and 84-1234, 2 FCC Rcd 1285 (1986) (hereinafter "Allocation Order").

[6] AMSS(R) is a mobile satellite service in which mobile earth stations are located on board aircraft. The (R) indicates that the spectrum is reserved for aeronautical communications related to the safety and regularity of flights. *See, e.g.*, Allocation Order at n. 115. Survival craft and emergency position-indicating radiobeacon stations may also participate in this service. *See* 47 C.F.R. § 2.1.

[7] Footnote US308 was modified to provide AMSS(R) with priority access as well as real-time preemptive capability in the MSS and also to require that systems not interoperable with the AMSS(R) operate on a secondary basis. *See* Memorandum Opin-

ion and Order, General Docket Nos. 84-1231, 84-1233 and 84-1234, 2 FCC Rcd 6830 (1987) (hereinafter "Allocation Reconsideration Order").

[8] Second Report and Order, General Docket No. 84-1234, 2 FCC Rcd 485 (1987).

[9] This date was extended by subsequent orders, as discussed in paragraph 8, *infra*.

[10] Declaratory Order, 2 FCC Rcd 2417 (1987).

[11] Four claimed that they had deposited $5 million into escrow accounts; seven claimed that they had obtained unconditional letters of credit. However, some of the applicants filed pleadings that questioned the notifications filed by others in the group. *See* Petition for Declaratory Ruling on MSSI's qualifications filed by Mobilesat (June 22, 1987); Letter from Counsel, Globesat to Chief, Domestic Facilities Division (July 16, 1987). *See also* Petitions to Dismiss Hughes, NAMS, Mobilesat, Global, MCCA and Skylink filed by MSSI (April 20, 1987). After an initial review of the applicant's notifications, the Bureau's staff requested three applicants - Hughes, MSSI and Globesat - to provide additional documentation. They complied with this request.

[12] Order, 2 FCC Rcd 5647 (1987) (hereinafter "August 13th Order").

[13] *See* Global Land Mobile Satellite, Inc., et al., 2 FCC Rcd 5552 (1987) (hereinafter "Dismissal Order").

[14] The five applicants were Hughes, MCCA, McCaw, SMTC and Skylink.

[15] *See* Letter of Hughes, MCCA, McCaw, SMTC and Skylink to Secretary, FCC (September 8, 1987). Aeronautical Radio, Inc. (Arinc) urged the Commission to reject the joint amendment and to dismiss all pending MSS applications for the applicants' failure to comply with Commission orders. *See* Letter of Counsel, Arinc to Chairman, FCC (September 9, 1987).

[16] *See* letter of Mobilesat, NAMS and TCI to Secretary, FCC (September 4, 1987).

[17] The petition requested the Commission to dismiss the joint amendment filed on September 4, 1987, and to endorse guidelines on competitive procurement policies and voting procedures for a joint operating agreement. Comments on the petition were filed by Ford Aerospace and Communications Corporation; RCA Astro-Space Division; and Hughes, MCCA, McCaw, SMTC and Skylink. Mobilesat, NAMS and TCI filed a consolidated response to the comments.

[18] *See* Public Notice, Report No. DS-746 (May 25, 1988). The Bureau had not accepted for filing the joint amendment filed on September 4, 1987 by the group of five applicants.

[19] COMGEN's opposition was based on AMSC's request to locate one of its proposed satellites at 75^0 W.L., an orbital location assigned to a COMGEN satellite. In its opposition and response, AMSC stated it would accept a different location in that portion of the arc.

[20] The National Telecommunications and Information Administration (NTIA filed comments generally supporting use of 12/14 GHz frequencies for feeder links and urging prompt action on AMSC's application. NTIA also expressed general support for the FAA's comments in this proceeding.

[21] Footnote NG104 provides that only international fixed-satellite service (FSS) systems may be assigned to the 10.7-11.7 GHz and 12.75-13.25 GHz bands.

[22] 3 FCC Rcd 6972 (1988). In that proceeding the Commission denied AMSC's request to reserve three 12/14 GHz orbital locations for mobile satellite feeder link operations. AMSC has filed a petition for reconsideration of this decision. Although most of the issues raised in AMSC's petition are addressed in this order, several minor issues will be addressed in a separate order concerning the FSS proceeding. Thus, AMSC's petition will be acted on in that proceeding.

[23] FCC 89-185 (adopted May 31, 1989).

[24] The Commission may dismiss an application without a hearing for failure to comply with prescribed requirements. *See* Columbia Communications Corp. v. FCC, 832 F.2d 189 (D.C. Cir. 1987); *see also* U.S. v. Storer Broadcasting, 351 U.S. 192 (1956).

[25] *See also* Land Mobile Satellite Service, Gen. Docket No. 84-1234, FCC 89-182 (adopted May 31, 1989) (hereinafter "MSS Reconsideration Order").

[26] *See* Order, 2 FCC Rcd 5647 (1987) (hereinafter "August 13th Order"). The cut-off date for MSS applications was March 29, 1985. *See* Public Notice (March 15, 1985).

[27] *See* Second Report and Order at paras. 22-24. *See also* MSS Reconsideration Order at para. 30.

[28] *See* MSS Reconsideration Order at para. 31-32.

[29] *See* August 13th Order, 2 FCC Rcd 5647 (1987).

[30] *See* Hughes, MCCA, McCaw, Mobilesat, NAMS, SMTC, Skylink and TCI, Notification (August 26, 1987) (hereinafter "Escrow Agreement") (documentation provided on each applicant's deposit into the joint escrow account, the escrow agreement, and related administrative arrangements).

[31] MSSI also argued that the transfer of control of Hughes to General Motors violated the cut-off rules. The Bureau had waived the MSS cut-off requirements when Hughes was acquired by General Motors shortly after Hughes's MSS application was filed. *See* Hughes Communications, Inc., 59 RR 2d (P&F) 502 (Com. Car. Bur. 1985).

[32] MSSI relies on a statement in the escrow agreement that Skylink is an applicant for a MSS license "in the name of and on behalf of a limited partnership (Skylink America, Ltd.) to be formed."

[33] Skylink stated in its original application that various entities hold options to acquire positions in Skylink America, Ltd. if and when it is formed upon grant of a MSS license, but that they do not currently own or control Skylink. Skylink has consistently reported any changes regarding these option holders.

[34] *See* Declaratory Order, 2 FCC Rcd 2417 (1987). *See also* letter of Counsel, Skylink to Secretary, FCC (August 21, 1987); Escrow Agreement, para. 8.

[35] 93 FCC 2d 1260 (1983).

[36] Globesat also alleges that SMTC's $5 million is a loan from four other applicants. Even if true, such an allegation by itself would not warrant dismissal of SMTC's application. Further, the record does not support this allegation. Globesat also cites TCI's $5 million loan from an option holder, which we discuss further at paragraph 31, *infra*.

[37] MSSI claims it demonstrated its financial ability to contribute to the consortium when it sent what purported to be a check for $5 million payable jointly to the "Federal Communications Commission and MSS Consortium," rather than contributing to the joint escrow account. We have already found that, even if the instrument were negotiable, MSSI's actions did not comply with our requirements. *See* MSS Reconsideration Order at para. 54.

[38] The applicants also disagree with Arinc-ATA's allegation that the $40 million in the central escrow account is insufficient to support their proposed $800 million satellite system. The applicants argue that these amounts are in direct proportion to

those used in the Commission's formulation of each applicant's cash contribution (approximately $20 million in pre-operational expenses for an estimated $400 million system).

[39] *See* MSS Reconsideration Order at para. 30.

[40] *Id.* at para. 28.

[41] *Id.* at para. 38.

[42] *Id.* at para. 50.

[43] *Id.*

[44] *See* MSS Reconsideration Order at paras. 30, 50.

[45] The escrow agreement was made before the applicants agreed to a joint operating structure, and it provides that each party has separate contribution accounts. The escrow agreement states that funds may be withdrawn from the escrow account for consortium use only as provided by the joint operating agreement. *See* Escrow Agreement at paras. 2, 7 (c).

When the applicants were negotiating the terms of the operating agreement, they filed a joint request for a ruling under 47 C.F.R. § 1.2 that the agreement could contain a funding mechanism that allowed each member to withdraw funds from the escrow account equal to the contributions it would be required to make under the consortium's capital calls. *See* Letter of Hughes, MCCA, McCaw, Mobilesat, NAMS, SMTC, Skylink and TCI to Chief, Common Carrier Bureau (March 7, 1987). In response, the Bureau stated that, once the agreement was filed, funds could be withdrawn from the escrow account for consortium-related expenses. It further stated that each member's minimum contribution to the consortium is the $5 million escrow deposit and that any member withdrawing these funds for its own purposes or refusing to release the entire sum to the consortium would be found unqualified and not permitted to participate further in the consortium. *See* Letter of Chief, Common Carrier Bureau to Hughes, MCCA, McCaw, Mobilesat, NAMS, SMTC, Skylink and TCI (April 7, 1988).

[46] *See* Stockholders' Agreement at Article 2, § 2.3.

[47] A purchase price of $10.00 per share was used for the initial subscription. Hughes, MCCA, McCaw, Mobilesat, SMTC, Skylink and TCI each purchased 2,561 shares of Class A common stock, representing a 14.0714% ownership interest for each, for a total investment of $179,270.00. NAMS purchased 273 shares of Class B common stock, representing a 1.5002% ownership interest, for $2,730.00. *See* Stockholders' Agreement at Article 2, § 2.3, Exhibit C. Only Class A stockholders vote and serve as corporate directors.

[48] *See* Certificate of Incorporation at Article 9.

[49] We expect the parties to decide which course of action is in their best interest, although we note that each alternative is fundamentally different. For example, under the Stockholders' Agreement the parties may elect either Class A or Class B common stock, whereas the Certificate of Incorporation limits the stockholders to additional shares of the same class of stocks. *See* Certificate of Incorporation at Article 9, § C.

[50] We will allow the individual applicants 60 days from the release of this order to provide this certification.

[51] *See* Stockholders' Agreement at Article 3, Exhibits D and E. The lender would be the owner of record of the pledged shares. The principal and interest amounts owed by NAMS would be paid from the cash dividends due NAMS as a stockholder and assigned by NAMS to the lender. The agreement states that the loan proposal is conditioned on the Commission finding it consistent with the *Second Report and Order* and that some provisions may require Commission consent.

[52] *See* MSS Reconsideration Order at para. 31.

[53] *Id. See also* Second Report and Order at paras. 20-24.

[54] NAMS also asked the Bureau to clarify its declaratory ruling of April 7, 1988, (*see supra* note 44) that any member using escrow funds for its own purposes or refusing to release the entire sum to the consortium would be found unqualified. *See* Letter of Counsel, NAMS to Chief, Common Carrier Bureau (June 13, 1988). The Bureau replied that NAMS in its inquiry recognized the purposes of the $5 million escrow deposit: establishing each applicant's financial ability and providing an initial contribution to the consortium's capital. It also reminded NAMS that the Commission would not make an official finding on each applicant's qualifications until it took final action on the applications. *See* Letter of Chief, Common Carrier Bureau to Counsel, NAMS (July 15, 1988).

[55] *See* MSS Reconsideration Order at para. 50. NAMS contends that it is unfair to require it to pay as much as the other consortium members because it has a significantly smaller ownership interest. NAMS, however, agreed to only a 1.5% interest even though it should have known at the time that it would have to contribute $5 million to the consortium.

[56] On reconsideration, we have affirmed that, although the consortium will be the licensee, it is the individual applicants who constitute the consortium who individually must demonstrate their ability to finance it. *See* MSS Reconsideration Order at para. 28. On reconsideration, we also found unpersuasive an argument raised by Global that an applicant could rely on a consortium plan to raise funds in lieu of making a $5 million cash contribution because, although we always recognized the consortium's need to raise additional funds, the purpose of the financial requirement was to determine each applicant's financial ability and to deter speculative applicants. *Id.* at para. 56.

[57] The cut-off date for filing MSS applications was March 29, 1985.

[58] *See* August 13th Order at n. 24.

[59] *Id.* We affirm that we will not act on this issue unless TCI requests authority to exercise the stock option control of TCI to another party.

[60] In this regard, Hughes cites Airsignal International, Inc., 81 FCC 2d 472 (1980), and Hughes Communications, Inc., 59 RR 2d (P&F) 502 (Com. Car. Bur. 1985).

[61] *See, e.g.*, Amendment of Commission's Rules and Regulations for Domestic Public Radio Services, Docket No. 19905, 38 RR 2d (P&F) 363, paras. 13-19 (1976) (hereinafter "Domestic Public Radio Services"). *See also, e.g.*, 47 C.F.R. §§ 21.31(e)(3), 22.23(g)(3).

[62] *See, e.g.*, Metromedia, Inc., 55 RR 2d (P&F) 1278, 1282 (1984). We also note that the Bureau gave public notice of TCI's ownership amendment, as is necessary for a major amendment. *See* Public Notice, Report No. DS-624 (May 6, 1987).

[63] *See, e.g.*, Airsignal International, Inc., 81 FCC 2d at para. 10 (1980).

[64] *See, e.g.*, Domestic Public Radio Services at para. 15.

[65] In extending the deadline, the Bureau stated that it was a procedural rule change to which the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553, did not apply. *See* August 13th Order at n. 28.

[66] *See supra* note 17.

[67] 47 C.F.R. § 0.291(a)(2) provides: "The Chief, Common Carrier Bureau shall not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines."

[68] *See, e.g.*, 47 C.F.R. §§ 0.91(a), 1.46.

[69] *See, e.g.*, 47 C.F.R. §§ 0.91(a), 1.3.

[70] The joint operating agreement indicates that the consortium may pursue an alternative means to provide service before a dedicated MSS system is operational. If AMSC pursues this course of action, it will have to file a separate application requesting such authority.

[71] Globesat also urges the Commission to examine alternative approaches to providing MSS (*e.g.*, use of existing satellite capacity) that do not require a consortium structure. This request is beyond the scope of this proceeding.

[72] As an AMSS(R) applicant, AMSC has applied for 1 MHz of spectrum (1558.5-1559 MHz, 1660-1660.5 MHz) that is allocated to AMSS(R). This band segment was not included in the MSS allocation and licensing procedure covered by General Docket No. 84-1234.

[73] Arinc-ATA contend that the *Allocation Reconsideration Order* unlawfully and retroactively restricted access to the co-primary band to MSS. The petitioners also have raised this issue in a petition for further reconsideration of the allocation decision, and we fully address this issue in Memorandum Opinion and Order, Gen. Docket No. 84-1234, FCC 89-181 (adopted May 31, 1989) (hereinafter "Allocation Further Reconsideration Order").

[74] Arinc-ATA claim that the *Allocation Reconsideration Order* unlawfully and retroactively restricted APC as a MSS offering subject to the prior cut-off. The petitioners also have raised this issue in a petition for further reconsideration of the allocation decision, and we fully address this issue in Allocation Further Reconsideration Order, FCC 89-181 (adopted May 31, 1989)

[75] We do not share Arinc-ATA's view of the 1987 Mobile WARC decisions on this issue. The Conference modified Article 50 of the ITU's Radio Regulations to prohibit APC in frequency bands allocated for AMSS(R). However, it also provided that in the 1545-1555/1646.5-1656.5 MHz bands an administration may choose to provide APC subject to Article 51's order of priority for aeronautical mobile services. Thus, use of these frequencies for APC is an exception to a general policy disfavoring such use. As explained in the *Allocation Further Reconsideration Order* at paras. 28-29, we do not believe the public interest warrants our permitting APC as part of AMSS(R).

[76] Although Arinc-ATA have acknowledged in this proceeding that the MSS can provide some ATC and APC services, they view both ATC and APC as primarily aviation services that should be offered over a separate aeronautical system. All of these issues are addressed in the *Allocation Further Reconsideration Order* at paras. 20-29.

[77] Arinc filed an application to construct a global aeronautical system (AVSAT) that would provide both safety and non-safety communications including APC. The Commission dismissed the application, *see* Aeronautical Radio, Inc., 2 FCC Rcd 5990 (1987) (hereinafter "AVSAT Dismissal Order"), and Arinc petitioned to reinstate *nunc pro tunc* the application. Arinc-ATA claim that the AVSAT and AMSC applications are mutually exclusive and must be considered simultaneously pursuant to *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). The petition is addressed in Aeronautical Radio, Inc., FCC 89-184 (adopted May 31, 1989) (hereinafter "AVSAT Reconsideration Order").

[78] *See* Notice at para. 4.

[79] *Id.*

[80] *Id.*

[81] *Id.* at para. 40. In addition, we stated that MSS applications had to propose mobile voice, paging/dispatch, rural telephone, interconnection and, depending on whether an L-band allocation was made, aeronautical services. *Id.* at Attachment E. We also stated that applicants could propose additional services such as interactive data and surveillance, lowspeed data, thin-route fixed, trunking, and vehicle location.

[82] *Id.* at paras. 4, 47.

[83] *Id.* at para. 4, n. 44.

[84] *Id.* at para. 47, n. 44, Attachment E. Because APC would likely involve interconnection with the public switched network, it clearly is an incidental or auxiliary mobile common carrier service and comes within the scope of services that prospective MSS applicants could propose to offer.

[85] Arinc-ATA objected to AMSC's proposal to provide transportable service, claiming this is a fixed-satellite service. Transportable service in rural areas comes within the intended service parameters for MSS as described by the *Notice*.

[86] We indicated that the separate allocation could be used by AMSS(R) systems provided by or on behalf of the FAA or other civil aviation entities. *See* Notice at paras. 18-19.

[87] *Id.* at para. 17.

[88] *Id.* at n. 45.

[89] *Id.* at n. 49, 51, 52.

[90] *Id.* at para. 19. The Commission has maintained this view throughout this proceeding. *See, e.g.*, Allocation Order at n. 115; Second Report and Order at n. 6.

[91] *See* Allocation Order at para. 155.

[92] *See* Allocation Reconsideration Order at para. 55.

[93] Had Arinc filed an acceptable AMSS(R) application, it would have been accorded comparative consideration. As discussed in our decision affirming the dismissal of the AVSAT application, Arinc failed to file an acceptable application. *See* AVSAT Reconsideration Order, FCC 89-184 (adopted May 31, 1989).

[94] We also find that potential applicants had adequate notice that we would accept for filing AMSS(R) applications. Public notice was given of both the AVSAT application and the AMSC joint amendment proposing aeronautical services in the L-band; neither public notice provided a cut-off date. Additionally, Arinc-ATA's comments indicate that they were aware that AMSC sought to be an AMSS(R) licensee. *See* AVSAT Reconsideration Order at para. 16.

[95] We find that this and related proceedings have provided many opportunities for comment on issues concerning the allocation, MSS-AMSS(R) services and MSS-AMSS(R) system design. The combined record is extensive. Arinc, ATA and other aviation entities have actively participated at every stage of the proceedings. Further, AMSC's proposal for a combined MSS-AMSS(R) system and Arinc's AVSAT proposal have resulted in an extensive record that incorporates the aviation community's views on sharing arrangements for use of the L-band. For example, the FAA, which is the U.S. governmental agency responsible for ATC services and initially opposed the spectrum sharing concept, has filed comments stating that it believes that aviation's requirements can be met within the context of this proceeding and a generic mobile satellite system architecture.

[96] *See* Allocation Reconsideration Order at para. 54.

[97] *See* AVSAT Reconsideration Order at para. 13.

[98] *See* Allocation Order at paras. 147-151. *See also* Allocation Reconsideration Order at para. 34.

[99] Earlier efforts in the 1970's to implement a dedicated AMSS(R) system (Aerosat) failed in large part because the concept was not economically feasible. *See, e.g.*, McArtor, *FAA's Mobile Satellite Policy*, Aviation Week and Space Technology, August 15, 1988, at 9. Even the AVSAT proposal calls into

question the viability of a dedicated AMSS(R) system because Arinc itself had proposed to provide capacity for APC and other non-safety services.

[100] For example, Canada is pursuing plans for a mobile satellite system in cooperation with AMSC, and Inmarsat is pursuing plans for both aeronautical and land mobile services. Other countries also are planning mobile satellite systems.

[101] Regarding safety communications, AMSC's application states that it will set aside some bandwidth on the satellite system for operation by the FAA or other aviation entities.

[102] The 1987 Mobile WARC had allocated these bands, which are now used for maritime services, on a co-primary or secondary basis to the land mobile satellite service. The U.S. has not yet decided whether to implement the allocation, which does not come into force until October 3, 1989, and which is at issue in a petition for Rule Making that is now pending at the Commission. *See* Geostar Messaging Corporation, Petition for Rule Making, RM-6459, June 16, 1988; *see also* Public Notice, Report No. 1741, July 27, 1988.

[103] Because we find the MSS applicants financially qualified to implement an MSS system, *see supra* para. 29, AMSC's financial ability to be licensed for AMSS(R) also is not an issue since both services will be provided on a single system.

[104] *See* GE American Communications Inc., 3 FCC Rcd 6871 (1988); 1988 Domestic FSS Assignment Order, 3 FCC Rcd 6972 (1988).

[105] Whereas services in a co-primary allocation have equal rights in using spectrum, a service in a secondary allocation cannot cause or claim protection vis-a-vis a primary or permitted service to which frequency is already assigned or may be assigned at a later date. *See* 47 C.F.R. § 2.104 (d). The U.S. allocation imposes a further requirement on use of the spectrum. Although both MSS and AMSS(R) have equal rights for interference protection in the co-primary band segment, MSS must yield access to the spectrum on an as needed basis to AMSS(R). *See also supra* note 7 and para. 47; *see also infra* para. 93.

[106] Arinc-ATA do not object to AMSC's use of 8 MHz at 1555-1559/1656.5-1660.5 MHz because use of these segments for land mobile service conforms with the new international allocation. Under that scheme, land mobile satellite service is allowed in the top 8 MHz of the paired bands, and the remainder of the bands is designated for AMSS(R). For a more complete discussion of the new international allocation, see *Allocation Further Reconsideration Order* at paras. 9-19.

[107] Under the international allocation, maritime mobile satellite service (MMSS) and land mobile satellite service (LMSS) will be co-primary at 1530-1533/1631.5-1634.5 MHz. MMSS will be primary and LMSS will be secondary at 1533-1544/1626.5-1631.5/1634.5-1645.5 MHz. Except for the segments at 1530-1533/1631.5-1634.5 MHz, LMSS will be limited to non-speech, low bit-rate data transmissions. *See also supra* note 102.

[108] Arinc-ATA also questioned the AMSC failure to apply to use the 1544-1545/1645.5-1646.5 MHz bands which are allocated for mobile satellite use to meet distress and safety needs. The AMSC replied that these bands are not included in this proceeding and are currently used by INMARSAT. We agree with AMSC that these bands are not part of this proceeding for our domestic allocation for AMSS(R), and we do not see any reason to expand the scope of this proceeding to require use of these bands at this time.

[109] Our decision not to adopt the new international allocation for the 1545-1559/1646.5-1660 MHz bands is fully discussed in *Allocation Further Reconsideration Order* at paras. 9-19.

[110] If AMSC cannot achieve interference protection for both AMSS(R) and MSS within the bandwidth being used by both systems, it could use frequency interleaving to achieve the desired protection for each service.

[111] *See supra* note 102.

[112] AMSC cites the Bureau's letter requesting further amendments. *See* letter from Chief, Domestic Facilities Division to Counsel, AMSC (November 10, 1988).

[113] *See* Allocation Reconsideration Order at para. 57.

[114] *See* Notice at para. 22; Allocation Order at para. 156.

[115] *See* Second Report and Order at para. 30.

[116] *See, e.g.*, Systematics General Corporation, 103 FCC 2d 879 (1985).

[117] Although the joint amendment sought 500 MHz at 12/14 GHz, AMSC clarified in pleadings that it needed only 100 MHz for feeder link purposes.

[118] *See infra* note 137.

[119] *See* 1988 Domestic FSS Assignment Order, 3 FCC Rcd 6972 (1988).

[120] The frequency bands subject to the allotment plan are: (a) uplink at 6725-7025 MHz, 12.75-13.25 GHz, (b) downlink at 4500-4800 MHz, 10.70-10.95 GHz, 11.20-11.45 GHz. The U.S. has been alloted the 101^0 W.L. orbit location under the plan. *See* ITU, Space WARC Final Acts, Appendix 30B (Geneva, 1988).

[121] Geostar cites *Inquiry in Preparation for General World Administrative Radio Conference (GWARC Inquiry)*, 70 FCC 2d 1193, 1252 (1978) in support of this premise.

[122] NCTA also objects to AMSC's argument that other frequency bands are not available for MSS feeder link operations based on high cost factors. NCTA observes that not only did CARS operators have to expend their own resources to secure equipment to use the 13 GHz band, but that they will also have to absorb additional expenses if MSS is allowed in the band due to coordination, relocating facilities or lost channel capacity.

[123] NCTA points out that CARS operations are usually continuous, use most of the available channels in the band, and have limited options for facilities locations because of franchise requirements.

[124] AMSC cites *Frequency Allocations - Satellite Services*, 26 RR 2d (P&F) 1257, 1263-65 (1973) in support of this premise. It claims that the footnote restriction was later applied to other portions of the 11/13 GHz bands for the same reasons and cites *GWARC Inquiry*, 70 FCC 2d 1193, 1252 (1978) in support.

[125] In late-filed comments, the National Academy of Science, Committee on Radio Frequency questions whether AMSC's use of the 10.70-10.95 GHz band will protect radio astronomy observations in the adjacent 10.68-10.70 GHz band. As the Academy itself indicates, our Table of Allocations requires such protection pursuant to footnotes US74 and US211, *see* 47 C.F.R. § 2.106. In a responsive pleading, AMSC represents that, at frequenices below 10.7 GHz, it will limit spectral power flux densities to less than -255 dB(w/(m^2 x Hz)), thereby satisfying US211. Satisfied with AMSC's representations, the Academy later withdrew its comments.

[126] Because we are now authorizing AMSC to use any 100 MHz within the 200 MHz requested, a modification application specifying which 100 MHz segments will be used will be treated as a minor modification of the authorization.

[127] We recognize, however, that both the 11/13 GHz and the 12/14 GHz frequencies will be used to provide communications between the NOC and the hub earth stations via the satellite for channel assignment and management of the mobile communications ("back haul" services). *See also infra* para. 76.

[128] *See* Allocation Order at para. 156.

[129] *See supra* para. 61.

[130] *See* 47 U.S.C. § 302(b)(2)(c); Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

[131] *See* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

[132] *Id.*

[133] *See* GWARC Inquiry, 70 FCC 2d 1193, 1252 (1978); Frequency Allocations - Satellite Services, 26 RR 2d 1257, 1263-65 (1973).

[134] Canada is currently planning to use the 13.0-13.20 GHz band for uplink transmissions. *See* Canada Department of Communications, Radio Act Notice DGTP-002-89 (March 21, 1989). We expect that the 50 MHz difference between the Canadian and AMSC plans can be resolved if both systems use dual polarization with only 100 MHz of bandwidth.

[135] Contel ASC had questioned whether the MSS system could use these 11/13 GHz frequencies at all three orbital locations. Although the international allotment plan procedures provide that administrations can request additional orbital locations, the procedures are untried and securing additional locations under the plan is uncertain. The untried nature of the plan also will require that, after AMSC submits technical information (*see infra* para. 91), we further examine the plan and the associated procedures in order to ensure that dual polarization can be used without adversely affecting allotments of other administrations.

[136] The 11.7-12.2 GHz band is allocated to fixed-satellite service downlink transmissions; the 14.0-14.5 GHz band to uplink transmissions.

[137] The Commission generally processes applications for domestic fixed-satellites in groups so that all requests for limited orbital resources can be considered concurrently. *See, e.g.*, 1988 Domestic FSS Assignment Order, 3 FCC Rcd 6972 (1988); American Telephone and Telegraph Company, 2 FCC Rcd 4431 (1987).

[138] Fixed-satellites operating in the 12/14 GHz bands are assigned to use 500 MHz of spectrum for uplink transmissions and 500 MHz for downlink transmissions. *See* 47 C.F.R. § 2.106. The Commission's technical standards require all fixed-satellite operators to use the entire 500 MHz employing full frequency reuse. *See* Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 2d (P&F) 577, 598 (1983).

[139] *See* Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972 (1988); 50 Fed. Reg. 35228 (August 30, 1985); 94 FCC 2d 129 (1983); 84 FCC 2d 584 (1981); *see also* Domestic Communications Satellite Facilities, 22 FCC 2d 86 (1970).

[140] We will not impose the qualification standards that we apply to domestic fixed-satellite applicants to AMSC, as Geostar requests. AMSC is not a domestic fixed-satellite applicant; it is required to meet the licensing requirements and processing procedures for a mobile satellite service licensee only.

[141] Because we are not requiring the co-location of an MSS satellite with a domestic fixed-satellite, as AMSC had proposed, the commenters concerns regarding co-location have become moot.

[142] Contrary to Geostar's claim, this situation is not similar to the one in which Geostar requested authorization to include an RDSS package on GTE Spacenet's proposed operational GSTAR 4 domestic fixed-satellite. In that case, we concluded that the application to operate GSTAR 4 must be considered as part of a domestic fixed-satellite processing group. *See* GTE Spacenet Corporation, 2 FCC Rcd 5312 (1987). Only a portion of the capacity of GSTAR 4 was to be used to provide RDSS service; GTE Spacenet was still to use the satellite to provide primarily fixed-satellite service to users.

[143] Moreover, Contel ASC's allegation that the diminished supply of 12/14 GHz band fixed-satellite service transponders will lead to an increase in rates to users is unsupported. Indeed, because there is remaining available spectrum in these bands, we fail to see how allowing AMSC to use 100 MHz at two "fringe" locations will have any effect at all on fixed-satellite transponder rates.

[144] *See, e.g.*, 1988 Domestic FSS Assignment Order at para. 16.

[145] ICAO-FANS, Third Meeting Report, November 3-21, 1986.

[146] The AMSC suggests that the aviation community can design and operate its own system within the network architecture. It is willing to make a block of bandwidth available for AMSS(R) use, not merely channel by channel assignments. The amount of bandwidth and power set aside for a separate aviation system would be determined by agreement among the parties.

[147] The MSS applicants were directed to comply with the application information requirements set forth in Appendix B of the *1983 Domestic FSS Processing Order*, 54 Rad. Reg. 2d (P&F) 565 (1983). *See* Second Report and Order at para. 49.

[148] FAA, Comments, Attachments 1-5.

[149] *See* Second Report and Order at para. 28-29.

[150] *Id.*

[151] In the U.S., the Radio Technical Commission for Aeronautics (RTCA), a public committee sponsored by the FAA, is developing standards for domestic AMSS(R) systems through its Special Committee 165 (SC-165). *See also infra* para. 92. In 1988 the ICAO Aeronautical Mobile-Satellite Service Panel (AMSSP) was established to further the specific technical work necessary to develop the framework for a worldwide, interoperable and internationally agreed-upon aeronautical mobile satellite service for safety communications. The second meeting of the panel was held in Montreal, March 28-April 7, 1989, and future meetings are planned. *See also supra* note 145. U.S. domestic standards are expected to be compatible with standards eventually adopted by ICAO.

[152] *See, e.g.*, Satellite Business Systems, Mimeo No. 6194 (August 5, 1985); GTE Satellite Corp., Mimeo No. 6192 (August 5, 1985); GTE Satellite Corp., Mimeo No. 1181 (December 2, 1985); Satellite Business Systems, Mimeo No. 1438 (December 18, 1984).

[153] Although this filing will be treated as a major modification subject to public notice and comment, it will be exempt from our cut-off rules. We expect the modification to reflect input from the aviation community as discussed in paragraph 92, *infra*.

[154] Arinc-ATA, claiming that link margin needs are greater at the Ku-bands than at C-band, question if Ku-band margins can be met for AMSS(R).

[155] RTCA invites participation from both the public and private sectors in advising the FAA on various aviation concerns. *See also supra* note 151.

[156] We previously endorsed this open-access approach for a MSS system operating in these bands. *See* Second Report and Order at para. 30-31.

[157] Arinc-ATA also cite an ICAO priority scheme, *see* ICAO, Aeronautical Telecommunications, Annex 10, vo. 2, § 5.1.8 (4th ed., 1985). This scheme is consistent with Article 51 of the international Radio Regulations, and could be used for the MSS-AMSS(R) system.

[158] Several transmission schemes are being reviewed by the aviation community, including Frequency Division Multiple Access (FDMA) and Time Division Multiple Access (TDMA). In addition, other modulation schemes such as Code Division Multiple Access (CDMA) are being considered for land mobile communications. AMSC must demonstrate that any scheme proposed for the MSS system ensures priority and preemptive access for AMSS(R) across the whole frequency band.

[159] *See, e.g.*, Allocation Reconsideration Order at paras. 28-36.

[160] *See supra* para. 85.

[161] The FAA has established methods for handing off aeronautical traffic within the U.S. and between the U.S. and other countries (*e.g.*, Canada) using terrestrial communication networks. Similar methods using communications protocols are to be established for AMSS(R), and AMSC should work with the FAA on this requirement. Hand-off arrangements for non-AMSS(R) aeronautical traffic can be developed by our licensees and their prospective customers.

[162] AMSC can provide spot beam coverage of Hawaii, Puerto Rico and the Virgin Islands. We do not require AMSC to provide service to the ocean areas between the U.S. mainland and these islands. Also, in providing service to U.S. coastal areas up to 200 miles, AMSC can only provide service on or over ocean areas outside of the territory of any foreign country within the authorized area under this license.

[163] *See* Notice at paras. 35-38; Allocation Order at paras. 143-146.

[164] *See* Second Report and Order at para. 31.

[165] As a corollary, Arinc-ATA also allege that the U.S. will not be able to use the three U.S. satellite systems already advance published by the ITU because they were listed as AMSS(R).

[166] *See* Allocation Further Reconsideration Order at para. 15.

[167] *See id.* at n. 25 for a thorough description of the various coordination techniques and options currently being studied by the ITU's CCIR Interim Working Party 8/14 and Study Group 4.

[168] *See* Second Report and Order at para. 34.

[169] *See* Competitive Common Carrier Services (First Report and Order), 85 FCC 2d 1 (1980).

[170] *See* Second Report and Order at para. 34.

[171] *See supra* note 102.

[172] Geostar provides interim RDSS via RDSS payloads and a 3700-4200 MHz downlink on domestic fixed-satellites. *See* GTE Spacenet Corp. and Geostar Corp., 2 FCC RCD 5312 (1987); Geostar Positioning Corp., 4 FCC Rcd 4538 (1989).

[173] *See* Second Report and Order at paras. 34-35; MSS Reconsideration Order at para. 34.

[174] *See* Domestic Fixed-Satellite Service, CC Docket No. 85-135, 58 RR 2d (P&F) 1267, 1274 (1985).

[175] *See* Radiodetermination Satellite Service, Gen. Docket No. 84-689, 104 FCC 2d 650, 665 (1986).

[176] International considerations also are a factor in Commission determinations of milestone schedules. For example, ITU procedures to advance publish and coordinate satellite networks require that networks be brought into use within six years of advance publication by ITU, under most circumstances, in order to maintain a claim for interference protection. *See*, ITU, Space WARC Final Acts, Resolution COM 6/4 (Geneva, 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AERONAUTICAL RADIO, INC. File No. CSS-87-015(7)

For authority to construct an aviation satellite system (AvSat).

MEMORANDUM OPINION AND ORDER

Adopted: May 31, 1989; Released: August 4, 1989

By the Commission:

1. Aeronautical Radio, Inc. (Arinc) has filed a Petition for Reconsideration and Reinstatement of Application *Nunc Pro Tunc* requesting review of the Commission's order[1] dismissing its application to construct a global aeronautical mobile satellite communications system (AvSat). Hughes Communications Mobile Satellite Services, Inc., McCaw Space Technologies, Inc., North American Mobile Satellite, MCCA Space Technologies Corporation, Mobile Satellite Corporation and Satellite Mobile Telephone Company, collectively Mobile Satellite Service (MSS) applicants, filed a joint opposition to Arinc's petition for reconsideration. Arinc filed comments in response. On December 14, 1987, Arinc filed a Petition for Leave to File Supplemental Pleading and a Supplemental Pleading.[2] The MSS applicants filed an Opposition to the Supplement and Arinc submitted a reply.[3] For the reasons stated below we deny Arinc's Petition for Reconsideration and Reinstatement of Application *Nunc Pro Tunc*.

2. On April 14, 1987, Arinc filed an application for authority to construct and operate a global aeronautical communications satellite system to provide Aeronautical Mobile Satellite Service (R) [AMSS(R)].[4] Arinc proposed a world-wide aeronautical satellite system comprised of six satellites operating in the following frequency bands: 1548-1555 MHz, 1649.5-656.5 MHz, 5200-5208 MHz, 6450-6458 MHz, 1544-1545 MHz (on command), and 1645.5-1646.5 MHz (on command). Arinc envisioned that the AvSat system would provide a variety of safety related services, including air traffic control and emergency locator transmitters, as well as non-safety services such as aeronautical business communications and aircraft passenger communications.

3. In our *Dismissal Order* released September 10, 1987, we dismissed the AvSat application without prejudice for three reasons. First, we concluded that Arinc's proposed use of L-band frequencies 1548 - 1555 MHz and 1649.5 -1656.5 MHz was in conflict with the policies and allocations established in our Spectrum Allocation proceeding.[5] In the *Spectrum Allocation Order*, we allocated two 4.5 MHz segments, 1545 - 1549.5 MHz and 1646.5 - 1651 MHz, for the use of AMSS(R) on a primary basis, with MSS[6] permitted to operate on a secondary basis. We expected an AMSS(R) system first to seek to satisfy its spectrum requirements using these bands, which are referred to as the AMSS(R) primary bands. Two 9 MHz segments, 1549.5 - 1558.5 MHz and 1651 - 1660 MHz, were allocated for co-primary shared use between AMSS(R) and MSS systems. These are referred to as the co-primary bands. We envisioned that AMSS(R) systems unable to satisfy spectrum requirements in the segments set aside for its sole primary use would be given priority access for AMSS(R) communications in the 18 MHz to be shared with MSS.[7] Arinc's system proposed to occupy 79% of the frequencies allocated for co-primary shared use and a small part of the L-band segment designated as AMSS(R) primary. We found Arinc's application inconsistent with our Spectrum Allocation decisions because it failed to: 1) demonstrate that the band segments allocated exclusively to AMSS(R) on a primary basis were not adequate; and 2) address the issues of frequency sharing and technical compatibility in the co-primary band. Second, we concluded that Arinc, in proposing to provide aeronautical public correspondence (APC) as a major component of its business, had sought authority to provide a service that was not encompassed within AMSS(R).[8] We stated in our decision that the United States considers APC to be outside the scope of an AMSS(R) offering.[9] Finally, Arinc failed to demonstrate that it was financially qualified to construct and operate the AvSat system. Arinc claimed to have followed the financial standards established for international fixed satellite applicants. Even assuming these were the appropriate standards, Arinc failed to provide any documentation evidencing a current ability to meet the cost of construction and launch and operating expenses for one year after launch. We found that without any substantial showing on financial fitness we could not issue a final authorization to operate an international satellite system. In view of these deficiencies, we believed it was necessary to dismiss Arinc's application.

4. Arinc argues in its petition that it was foreclosed from utilizing the first 3 MHz in each of the two bands allocated for AMSS(R) primary use because the International Maritime Satellite Organization (INMARSAT) had advance published its proposal to operate an aeronautical mobile satellite system at 1545 -1548 MHz and 1646.5 - 1649.5 MHz. Arinc states that because INMARSAT's use of these frequencies is incompatible with its contemplated system, the segments set aside for AMSS(R) primary use were inadequate and it was justified in proposing to occupy a substantial portion of the shared band. Arinc also argues that it was not required to address frequency sharing with MSS since the Commission has not established any sharing guidelines.

5. With regard to public correspondence, Arinc asserts that the Commission has never attempted to place limits on the kinds of services an AMSS(R) system can provide and has never classified aircraft passenger communications as an exclusively MSS service. It also claims that we have misinterpreted international Radio Regulations on aeronautical mobile satellite services. According to Arinc, the International Telecommunication Union (ITU) does not consider the "R" in AMSS(R) to be a safety designation and does not prohibit the inclusion of public correspondence in an AMSS(R) offering. Consequently, Arinc believes that it was improper for us to dismiss the AvSat application on the grounds that it was proposing to offer APC with the AMSS(R). In its Supplemental Pleading, Arinc elaborated upon these claims contending that

the Commission acted improperly in the *Spectrum Reconsideration Order* when it "redefined" APC and aeronautical administrative communications (AAC) as MSS offerings without affording Arinc the opportunity to comment. It concludes that the Commission's decision in the *Spectrum Reconsideration Order* was designed to set the stage for a future " *AvSat Reconsideration Order* determination that APC and AAC are foreclosed to ARINC's AvSat system." Supplement to Petition for Reconsideration and Reinstatement of Application *Nunc Pro Tunc*, at pg. 10. Arinc also argues that if the domestic MSS system is permitted to offer APC and AAC services, the AvSat system should also be allowed to offer these services.

6. As a final matter, Arinc contends that the Commission improperly dismissed its application for failing to demonstrate its financial qualifications. Arinc argues that the Commission adopted its financial standard without any explanation with respect to what financial information was required and why it was necessary. Further, Arinc contends that the standard used was "inexplicably and unreasonably at variance with the financial qualifications standards adopted for recent new satellite proposals";[10] that is, the financial standards used for the international fixed satellite service and radio determination satellite service. Arinc adds that to the extent that the Commission required additional information, Arinc had indicated in its application its willingness to provide the Commission with whatever additional information was needed.

7. The MSS applicants argue that Arinc has failed to present any new evidence or to make any showing of error that would justify reconsideration. They maintain that Arinc failed to justify its choice of L-band frequencies and that the Commission acted within its discretion in dismissing the AvSat application on financial grounds. They disagree with Arinc's claim that the Commission has been inconsistent in referring to the range of services MSS could offer and take issue with Arinc's assertion that it is the victim of disparate treatment. In their view, Arinc's application cannot be compared to MSS since there are no rules, policies, or procedures governing the acceptance of AMSS(R) applications.

DISCUSSION

8. After a careful review of Arinc's petition and the comments submitted in response, we conclude that Arinc's application should not be reinstated *nunc pro tunc*. We conclude that the AvSat application is not acceptable because the proposal is inconsistent with the Commission's Spectrum Allocation decisions, including the Commission's pronouncements on the permissible scope of AMSS(R) offerings and the allocation of spectrum between MSS and AMSS(R).

9. First, we address Arinc's claim that it should be permitted to provide public correspondence service in the bands allocated for AMSS(R). As discussed below we believe that we have correctly read the international Radio Regulations as defining AMSS(R) to exclude APC. More importantly, throughout our Rule Making proceedings in Docket No. 84-1234, in which we divided spectrum domestically between AMSS(R) and MSS, we have made clear that APC offerings are solely within the scope of the MSS and that AMSS(R) includes only safety related services. Thus, in the *Notice of Proposed Rule Making* in General Docket No. 84-1234, discussions concerning the potential uses of the AMSS(R) allocation referred exclusively to communications related to safety and regularity of flight.[11] In contrast, we noted that the mobile satellite service may provide aeronautical services such as radiotelephone (air-to-ground) services for airline passengers.[12] Consistent with the *Notice*, on reconsideration in that Docket, we reiterated that AMSS(R) did not include APC service.[13] Indeed, allowing the provision of APC in the AMSS(R) would defeat the allocation policies adopted in that proceeding. Because we viewed the (R) designation as indicating that the spectrum was "reserved" for aeronautical communications related to safety and regularity of flight along national and international civil air routes, we allowed priority access for the AMSS(R) in that portion of the L-band that is co-primary with MSS.[14] Had we envisioned that AMSS(R) included general public correspondence, as well as safety related services, there would have been no reason to give the AMSS(R) services a blanket priority over MSS.[15] Accordingly, we will not reinstate Arinc's application since it is inconsistent with the spectrum allocation rules adopted in Docket No. 84-1234.

10. Our understanding of the scope of AMSS(R) is also consistent with the international Radio Regulations. International Radio Regulation 3.16, Article 1, defines AMSS generally as "a mobile-satellite service in which mobile earth stations are located on board aircraft." The (R) restriction on the AMSS(R) designation is not defined. However, Section 1 of Article 50 of the Radio Regulations, as amended by the 1987 Mobile WARC, explicitly provides that the (R) designation means that AMSS(R) services "are reserved for communications relating to safety and regularity of flight . . . along national or international civil air routes."[16] Furthermore, Section 4 specifically provides that public correspondence shall not be permitted in the frequency bands allocated to AMSS(R).[17] Additionally, neither the pre- or post-1987 Mobile WARC versions of Article 51, which list the order of priority of communications in both the AMS and AMSS, recognize APC as a distinct type of communication in these services. Accordingly, our conclusion that AMSS(R) does not include the provision of APC is fully supported by the international Radio Regulations.

11. In support of its argument that it should be allowed to provide APC service, Arinc now points to footnote 729A to the international table of frequency allocations, as added at the 1987 Mobile WARC and subsequent to our *Dismissal Order*.[18] That footnote now permits administrations, in their discretion, to allow public correspondence in the AMSS(R) bands in some circumstances. As discussed earlier, however, in General Docket 84-1234, our domestic allocation of spectrum between MSS and AMSS(R) was premised upon our belief that APC would not be encompassed within AMSS(R). We found that 10 MHz should be sufficient for an AMSS(R) licensee to provide routine AMSS(R) services -- for example, ATC -- in most circumstances.[19] Further, we explained that it would be necessary to allocate the remainder of the L-band, 14 MHz, to MSS, in order to ensure that the MSS is viable.[20] To conclude now that the AMSS(R) licensee should be permitted to provide APC would undermine this allocation and the scheme of spectrum priorities developed for these services. As explained in our *Spectrum Allocation Further Reconsideration Order*,[21] at a minimum, to consider Arinc's proposal now in that Rule Making, which has already lasted over four years, would require us

to further draw out those proceedings, and the public, concomitantly, would be denied MSS service for an indeterminate amount of time.[22] In light of the foregoing, we conclude that the provision of APC is outside the scope of AMSS(R), as defined in Docket No. 84-1234.

12. We also found in the *Dismissal Order* that Arinc had failed to demonstrate that the band segments allocated exclusively to AMSS(R) on a primary basis were inadequate for the provision of its service, and therefore that Arinc's proposed use of the co-primary spectrum was inconsistent with our *Spectrum Allocation Order*. In the *Spectrum Allocation Order*, we had indicated that AMSS(R) requirements initially should be satisfied in that portion of the band allocated to AMSS(R) on a primary basis. Thus, the co-primary spectrum was meant for the use of the MSS licensee subject to the AMSS(R) licensee utilizing that spectrum only when its immediate need for spectrum exceeded the 10 MHz in the AMSS(R) primary band.[23] Arinc's proposal was, and is, clearly inconsistent with these allocation policies because it would permit the AMSS(R) licensee to impinge unnecessarily on spectrum intended for MSS use, thereby adversely affecting the MSS's viability.[24] Moreover, Arinc has failed to demonstrate adequately why AMSS(R) needs require it to operate mostly in the co-primary spectrum. Arinc maintains that it was foreclosed from using part of the AMSS(R) primary band because of INMARSAT's intended use of the spectrum. We find this argument unpersuasive. We had not licensed the use of this spectrum in connection with the INMARSAT system at the time Arinc applied. In addition, the Commission has the sole authority to assign frequencies within the subject spectrum for commercial use in the United States. The mere fact that INMARSAT may have expressed an intent to use the spectrum for its international aeronautical mobile satellite service did not preclude Arinc, or any other applicant, from seeking authority to use the spectrum for the provision of AMSS(R) in the United States, consistent with our domestic spectrum allocation decisions. If a conflict did arise, the United States could enter into ITU coordination with INMARSAT concerning the use of that spectrum.[25] Thus, Arinc's failure to propose using this spectrum in a manner consistent with the Commission's allocation rules provides an independent basis for rejecting its application.

13. Arinc's failure to address frequency sharing in the co-primary bands raises an additional spectrum allocation concern. Because it failed to provide for frequency sharing with the MSS licensee in the co-primary bands, Arinc's proposal had the affect of limiting AMSS(R) and MSS systems to separate and distinct portions of the co-primary band. Such an allocation is inconsistent with our decision to provide for the shared use of the L-band.[26] Throughout Docket No. 84-1234, we have made clear that AMSS(R) and MSS will share the co-primary spectrum in accordance with footnote US308.[27] In particular, our allocation of the co-primary band was intended to ensure that the MSS licensee had access to sufficient spectrum to establish a viable system.[28] Grant of Arinc's application would leave the MSS licensee with much less spectrum in the co-primary band. Thus, to the extent Arinc was, and is, proposing an allocation plan that is inconsistent with the sharing arrangements set forth in footnote US308, it should, at the minimum, explain how it intends to provide the MSS licensee with access to the co-primary spectrum.

14. With respect to our dismissal of Arinc's application for failure to make an adequate financial showing, we agree with Arinc that this aspect of our decision warrants reconsideration. Our conclusion that Arinc had failed to demonstrate that it was financially qualified was premised upon our understanding that Arinc believed itself to be subject to the financial qualifications standard that the Commission had established for international fixed satellite systems.[29] However, upon carefully reviewing Arinc's application and in light of its arguments advanced on reconsideration, we find that Arinc had not agreed to subject itself to any particular financial standard. Rather, recognizing that the Commission had yet to adopt a financial standard for AMSS(R) applicants, Arinc had merely suggested that the standards used for the analogous international fixed satellite service and radio determination satellite service would provide useful guidelines with respect to the type of financial showing the Commission might ultimately desire for the AMSS(R).[30] In these circumstances, we agree that we should not have dismissed Arinc's application for failing to comply with a financial standard for AMSS(R) that we had not formally announced in advance.

15. Based on the foregoing, we find no basis for *nunc pro tunc* reinstatement of Arinc's application. Reinstatement *nunc pro tunc* is granted only under limited circumstances: 1) when an application has been dismissed in error, so as to enable the applicant to retain its comparative rights in a mutually exclusive situation; or 2) when exceptional public interest considerations justify the relief requested or when substantial equities favor the applicant.[31] Arinc has not shown that its application was dismissed in error or indeed, that its application would be acceptable now under our spectrum allocation rules and policies. Nor do public interest or equitable considerations require reinstatement of its application. In our *Dismissal Order*, we stated that Arinc could refile a proposal at any time if it corrected the deficiencies we had noted. It chose not to do so, apparently hoping to persuade the Commission to modify its spectrum allocation rules on reconsideration in Docket No. 84-1234 and because Arinc apparently had no interest in pursuing an AMSS(R) application unless the Commission modified its spectrum allocation rules to conform to Arinc's proposals.[32] Thus, Arinc has insisted upon reinstatement of its application as originally filed, despite its inconsistency with our rules and policies. As discussed above, we conclude that the application does not comply with the spectrum allocation rules adopted in Docket No. 84-1234, and we will not reinstate it *nunc pro tunc*.

16. Arinc also did not submit either a new or amended application for an AMSS(R) system in response to the public notice of May 25, 1988, announcing the filing by American Mobile Satellite Consortium, Inc. (AMSC) of an amended application for a combined MSS-AMSS(R) system. It responded to the public notice by filing a petition to deny the AMSC application. In its petition, Arinc argued that the Commission cannot grant the AMSC application to provide AMSS(R) in the same frequency bands Arinc proposed to use without calling for AMSS(R) applications or without simultaneously considering Arinc's AvSat application. There is no requirement that the Commission "call for" competing applications. We need only consider all *bona fide* competing applications that are filed before we act on a pending application that has been placed on public notice for at least 30

days.[33] Arinc was both on notice that the AMSC application had been filed and that it was permitted to file a competing, *bona fide* application for AMSS(R) at any time. Arinc chose not to file an acceptable AMSS(R) application and, therefore, is not entitled to comparative consideration with AMSC.[34]

17. Accordingly, IT IS ORDERED that the Petition for Reconsideration and Reinstatement of Application *Nunc Pro Tunc* filed by Aeronautical Radio, Inc. IS DENIED.

18. IT IS FURTHER ORDERED That the Motion for Extension of Time filed by the MSS applicants IS GRANTED.

19. IT IS FURTHER ORDERED That the Petition for Leave to File Supplemental Pleading filed by Aeronautical Radio, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Aeronautical Radio, Inc., 2 FCC Rcd 5990 (1987) (Dismissal Order).

[2] Arinc argued in its Petition for Leave to File Supplemental Pleading that several determinations made in the *Spectrum Reconsideration Order*, see *infra*, note 5, bear directly upon its efforts to obtain reconsideration of the *Dismissal Order* and reinstatement of its application *nunc pro tunc*. It asserts that the record will be incomplete unless it is allowed to comment on the impact of those matters on its AvSat application. In the interest of a complete record, we will grant Arinc's petition for leave.

[3] On December 16, 1987, the MSS applicants filed a Motion for Extension of Time to file the Opposition. They stated that additional time was needed to avoid diverting significant energy and resources from critical meetings regarding formation of the MSS consortium. In their Opposition, the MSS applicants argue that the Commission should not grant Arinc leave to file its supplemental pleading. According to them, the issues raised in the pleading relate to matters occurring well before the filing deadline and add nothing of significance to the debate. We believe the MSS applicants have provided sufficient justification for an extension. Consequently, in the interest of compiling a complete record, we will grant the MSS applicants request for an extension of time.

[4] AMSS(R) refers to a class of aeronautical mobile satellite services designed to enhance the safety and regularity of flights.

[5] *See* Report and Order, Gen. Docket Nos. 84-1231, 84-1233 and 84-1234, 2 FCC Rcd 1825 (1986) (Spectrum Allocation Order), *on recon.* Memorandum Opinion and Order, 2 FCC Rcd 6830 (1987) (Spectrum Reconsideration Order).

[6] MSS refers to a domestic mobile satellite service designed to provide universal communications service that is both terrain and distance insensitive. Possible offerings include rural-remote radio telephone service, commercial and public communications, and aeronautical non-safety mobile satellite services. *See* Second Report and Order, General Docket No. 84-1234, 2 FCC Rcd 485 (1987), *on recon*, Memorandum Opinion and Order, FCC 89-182 (adopted May 31, 1989).

[7] *See* Footnote US308, 47 CFR § 2.106 (1987). In response to questions from aviation and mobile satellite interests, we amended footnote US308 to clarify that MSS must provide AMSS(R) priority access with real-time preemptive capability on the co-primary frequencies. *See Spectrum Reconsideration Order*, *supra* note 5 at 6837 - 6838. This amendment, however, does not alter the requirement that AMSS(R) must first try to satisfy its spectrum requirements in the primary band.

[8] Dismissal Order, *supra* at 5991. *See also* Application at VII-6 which states that only passenger telephone service will be provided "with an element of profit."

[9] Dismissal Order, *supra* note 1 at 5991.

[10] Petition for Reconsideration and Reinstatement of Applications Nunc Pro Tunc, at page 16.

[11] *See* Notice of Proposed Rule Making, General Docket No. 84-1234, 50 Fed. Reg. 8149, 8154 (1985). The Commission also stated that the AMSS(R) bands were allocated to support domestic and international air traffic, including air traffic control. *See also* Spectrum Allocation Order, 2 FCC Rcd at 1844 and n. 115.

[12] Notice of Proposed Rule Making at 8151.

[13] Spectrum Reconsideration Order, at 6835 and at n. 42. Arinc and other aviation interests had filed a joint petition for reconsideration of the *Spectrum Allocation Order*, arguing that the entire 28 MHz of L-band spectrum was required for AMSS(R). We dismissed this argument, noting that the petitioners' arguments pertaining to AMSS(R) spectrum requirements were grounded largely on their erroneous view that public correspondence services could be provided in the frequency bands allocated to AMSS(R).

[14] Spectrum Allocation Order, 2 FCC Rcd at 1844.

[15] Indeed, Arinc is proposing to offer public correspondence services on a "secondary" basis to AMSS(R), *see* AvSat application at page 6. It effectively admits that APC is *not* an AMSS(R) service as contemplated in Docket No. 84-1234. The only domestic secondary service permitted in the AMSS(R) primary bands is MSS, and Arinc did not apply to be the MSS service provider.

[16] We recognize that, prior to the amendments to Article 50 at the 1987 Mobile WARC, Article 50 mentioned expressly only the Aeronautical Mobile Service (R) (AMS(R)). AMS(R) and AMSS(R) are essentially the same, however, except that the former does not use satellites. Thus, our discussions in the *Notice* in Docket No. 84-1234, specifying the types of safety-related services permitted in AMSS(R) bands, were based on former Article 50. The subsequent 1987 Mobile WARC amendments to Article 50 confirm the import of the "(R)" designation as it applies to both AMSS(R) and AMS(R). We believe that, both before and after the 1987 amendments, our interpretation of the (R) designation as denoting safety related services was proper.

[17] Section 4 also was amended by the 1987 Mobile WARC to include AMSS(R) as well as AMS(R). Because of the similarities between AMS(R) and AMSS(R), we assumed prior to the amendment that the prohibition was applicable to both AMS(R) and AMSS(R). Again, the 1987 Mobile WARC modifications confirm our interpretation of the effect of the "(R)" restriction on AMSS(R).

[18] Footnote 729A provides:

> Notwithstanding any other provisions of the *Radio Regulations* relating to restrictions in the use of the bands allocated to the aeronautical mobile-satellite (R) service for public correspondence, the bands 1545-1555 and 1646.5-1656.5 MHz may be authorized by administrations for public correspondence with aircraft earth stations.

Such communications must cease immediately, if necessary, to permit transmission of messages with priority 1 to 6 in Article 51.

[19] *See* Spectrum Allocation Order, 2 FCC Rcd at 1844; Spectrum Reconsideration Order, 2 FCC Rcd at 6836.

[20] *See* Spectrum Allocation Order, 2 FCC Rcd at 1844.

[21] The relevant discussion can be found in *Spectrum Allocation Further Reconsideration Order*, Gen. Docket No. 84-1234, FCC 89-181, para. 29 (adopted May 31, 1989) that was adopted the same day as this decision.

[22] With respect to the need for additional providers of APC, we do not believe such further regulatory delay is warranted. We also believe that there will be a sufficient number of providers of APC service to ensure substantial competition in that market without our also permitting the AMSS(R) licensee to provide that service. In addition to the MSS licensee, there likely will be at least one or two other providers of APC, as we have recently proposed to allocate spectrum in the 800/900 MHz bands for a terrestrial air-ground public correspondence service. *See Notice of Proposed Rule Making*, Gen. Docket No. 88-96, 3 FCC Rcd 2436 (1988). Further, the MSS licensee will be a common carrier, and vendors can resell the services it offers, including APC. These vendors would also provide some competition to the MSS licensees. Also, any APC system will, to some extent, have to compete with pay telephones in airports.

[23] *See* Footnote US308, 47 C.F.R. § 2.106. *See also* Spectrum Allocation Order, 2 FCC Rcd at 1844-45; Spectrum Reconsideration Order, 2 FCC Rcd at 6836-6838.

[24] *See* Spectrum Allocation Order, 2 FCC Rcd at 1844; Spectrum Reconsideration Order, 2 FCC Rcd at 6838.

[25] We note that in *Provision of Aeronautical Services via the INMARSAT System*, FCC 89-185, (adopted May 31, 1989), we subsequently authorized Inmarsat to use three megahertz of the AMSS(R) primary spectrum to provide international aeronautical mobile satellite services. Coordination between this system and Arinc's domestic operation of its AvSat system would have been possible. Various means of coordination are discussed in the *Spectrum Allocation Further Reconsideration Order*, FCC 89-181 (adopted May 31, 1989), which was adopted the same day as this item.

[26] Arinc argues that the Commission cannot dismiss its application for failure to explain how it will share the co-primary spectrum, when the Commission has not adopted guidelines specifying how an AMSS(R) licensee will obtain priority access in the co-primary band. In the circumstances, however, we were justified in requiring Arinc to explain its sharing proposal. Under our allocation scheme, sharing would have been necessary in the co-primary bands, only in the relatively rare circumstances in which an AMSS(R) licensee's own 10 MHz of spectrum was insufficient to satisfy its immediate spectrum requirements to provide AMSS(R) communications. In contrast, our concern with Arinc's proposal is that the AMSS(R) licensee is encroaching upon the MSS licensee's spectrum, without first using up its own, and in a manner that completely prevents the MSS licensee from using significant portions of the co-primary bands. As the co-primary band was intended primarily for the use of the MSS licensee, it was reasonable for us to expect an AMSS(R) licensee who is seeking to provide serice primarily in that band to explain how the MSS licensee will continue to be accorded access to all portions of the band.

[27] *See* Footnote US308, 47 C.F.R. § 2.106.

[28] *See* Spectrum Allocation Order, 2 FCC Rcd at 1844-45; Spectrum Reconsideration Order, 2 FCC Rcd at 6836-38.

[29] Arinc apparently continues to believe that the standard that the Commission used for the international fixed satellite service would be "appropriate," but it contends that the Commission is not applying that standard correctly. It believes that its submission of its anticipated costs and expenses, its own financial statement, as contained in its corporate annual report, its bank's indication that it would be willing to finance the venture, and Arinc's commitments from future customers is sufficient to establish its financial qualifications under this standard. In view of our determinations above that Arinc's application is inconsistent with our spectrum allocation rules, we need not reach these arguments.

[30] *See* Arinc's Opposition to Comments and Petitions to Deny, at pages 36 and 37.

[31] *See, e.g.*, Mobile Telecommunications Corp., 49 Rad. Reg. 2d 1506 (1981); Jackson Signal Co., 74 FCC 2d 514 (1979).

[32] In this regard, we note that Arinc could have perserved its rights by refiling its application in conformity with our rules and still have pursued its efforts to obtain reconsideration in Docket No. 84-1234 (or, indeed, reconsideration of the *Dismissal Order*). Had we determined on reconsideration to permit public correspondence in the AMSS(R) service, for example, or to allocate more or different spectrum to the AMSS(R), Arinc would have been afforded an opportunity to modify its AMSS(R) application accordingly. Because Arinc did not pursue this procedural option, and has at all times insisted on reinstatement of its original application, we may assume that Arinc has no interest in providing AMSS(R) service unless we change the rules adopted in Docket No. 84-1234.

[33] *See* 47 U.S.C. § 309(b)(2)(C); Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

[34] *See also* note 23, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-75

In the Matter of

Provision of Aeronautical Services via the Inmarsat System. File No. CSS 86-005-M(2)

Application for Authority to Participate in an Inmarsat Program to Provide for Aeronautical Bandwidth on Second Generation Satellites.

REPORT AND ORDER

Adopted: May 31, 1989; Released: August 4, 1989

By the Commission:

1. We initiated this rulemaking proceeding to determine how international aeronautical mobile satellite services via the International Maritime Satellite Organization (Inmarsat) will be provided in the United States.[1] This proceeding focuses on the policy alternatives and related issues looking toward the establishment of a domestic structure by which U.S. entities may access Inmarsat space segment to provide aeronautical services.

2. We initially received comments from Aeronautical Radio, Inc. (Arinc), American Petroleum Institute (API), the Communications Satellite Corporation (Comsat), Fedex International Transmission Corporation (Fedex), GTE Spacenet Corporation (GTE), the mobile satellite service providers (MSS Commenters),[2] MCI Communications Corporation (MCI), the National Telecommunications Information Administration (NTIA), and OTI Corporation (OTI).[3] The Department of State (State) submitted a copy of the letter it sent to NTIA stating its position on certain issues raised by the NPRM. We received reply comments from Arinc, Comsat, Fedex, GTE, MCI and NTIA.

3. In November of 1987 and again in May of 1988, Comsat and Arinc filed joint comments requesting the Commission not take final action in this proceeding until they could complete development of a business arrangement which they believed would ensure the earliest possible introduction of Inmarsat aeronautical services.[4] To date, Comsat and ARINC have not notified us that they have developed such an arrangement. However, both parties are now pressing for a Commission decision in this proceeding.

4. In October 1988, Comsat filed a petition requesting for immediate resolution of the docket. We provided an opportunity for additional comments on Comsat's petition.[5] Arinc and the Air Transport Association (hereafter Arinc), NTIA, Federal Aviation Administration (FAA), Department of State, Department of Defense (DOD), American Mobile Satellite Consortium (AMSC), Ford Aerospace Corporation (Ford), National Business Aircraft Association (NBAA), Hughes Network Systems (Hughes), Ball Communications Systems (Ball) and Fedex responded to Comsat's petition.[6] Comsat and Arinc also filed reply comments. In addition, Arinc filed further comments in response to Comsat's reply.[7] Comsat filed a letter addressing the Arinc response. Arinc filed an additional letter on April 5, 1989 addressing certain issues in the proceeding. Finally, AMSC filed a letter on April 27, 1989 in response to the April 5 Arinc letter. Additional letters were filed in the proceeding on May 1, 1989 by NBAA and Ball, on May 22, 1989 by Arinc, and on May 23, 1989 by AMSC.

BACKGROUND

5. Inmarsat is an independent international organization comprised of 55 member nations created to establish an international maritime satellite system to improve maritime communications for distress and safety of life at sea, public correspondence, radiodetermination and the management of ships. Inmarsat was established by a Convention signed by governments and by an Operating Agreement signed by either governments or their designated operating entities.[8] These documents set forth the institutional basis upon which the organization operates and the legal and financial requirements for participation in Inmarsat.[9]

6. The International Maritime Satellite Telecommunications Act (Maritime Satellite Act), 47 U.S.C. §§ 751 - 757, declares that it is the policy of the U.S. to support development and operation of a global maritime satellite telecommunications system by Inmarsat. The Act designates Comsat as the sole U.S. operating entity in Inmarsat and as the owner and operator of the United States share of jointly-owned international maritime space segment and associated facilities.

7. Inmarsat currently provides maritime satellite services to over 5000 ships and offshore facilities throughout the world by means of leased satellites (three operational and three in-orbit spares) serving the Atlantic, Pacific and Indian Ocean regions. It is planning to replace this first generation leased system with a second generation of satellites which it will own and operate. This second generation system will have triple the capacity of the first generation. The initial satellite in the second generation system is expected to be launched in late 1990.

8. In October 1985, the Inmarsat Fifth Assembly of Parties proposed amendments to its Convention and Operating Agreement to allow the organization to provide aeronautical services.[10] The United States filed its notice of acceptance with Inmarsat in April 1988. The Inmarsat Executive Organ has informed all Parties and Signatories that the requisite number countries had accepted the amendments as of June 16, 1989. In accordance with the terms of the Convention, the amendments will enter into force on October 13, 1989.

9. Inmarsat has designed each of the first four satellites in the second generation system with capability of providing aeronautical services in addition to maritime services. These satellites can operate in the current aeronautical mobile satellite service AMSS(R) frequency bands (1545-1548 MHz and 1646.5-1649.5 MHz) as well as in the maritime mobile satellite frequency bands (1530-1545 MHz and 1626.5-1646.5 MHz). Initially, Inmarsat had re-

quired its contractor to incorporate in these spacecraft bi-directional operational capability of one megahertz in the AMSS(R) frequency bands (1545-1546 MHz and 1646.5-1647.5 MHz).

10. On January 7, 1986, we granted Comsat's application to participate in Inmarsat's procurement of the first three of the second generation spacecraft based on the need for a follow-on system to meet future maritime satellite needs.[11] We recognized that the first three second generation satellites were designed to accommodate operations in the frequency bands (1545-1546 MHz and 1646.5-1647.5 MHz) allocated to the aeronautical mobile satellite services AMSS(R). However, our action in granting Comsat's application to participate in procurement did not give Comsat authority to provide aeronautical services.

11. Inmarsat subsequently decided to modify the design of its first three Inmarsat second generation spacecraft to add two more megahertz in the AMSS(R) band, for a total of three megahertz of bi-directional spectrum in each spacecraft's shore-to-ship transponder (1545-1548 MHz) and in each spacecraft's ship-to-shore transponder (1646.5-1649.5 MHz). On June 16, 1986, Comsat filed an application requesting authority to participate in this program. Comsat also filed a second application on September 19, 1986 which requested authority to lease space segment capacity in Inmarsat's first generation spacecraft to Arinc. Comsat requested this authority so that Arinc could use this capacity to provide aeronautical service to its subscribers in the Pacific and Atlantic Ocean regions. We denied both applications on January 12, 1987 (hereinafter referred to the *January 1987 Order).*[12] We stated that we could not authorize U.S. participation in Inmarsat aeronautical services unless and until the United States formally accepts the amendments to Inmarsat's charter and those amendments enter into force. Additionally, we found that the Maritime Satellite Act does not permit us to authorize Comsat to participate in aeronautical services via Inmarsat on a monopoly basis. On the record then before us, we concluded that the monopoly status conferred on Comsat under the Maritime Satellite Act is limited to the provision of maritime satellite services and that the legislative history of the Act shows that Congress intended Comsat's monopoly role in Inmarsat to be so limited. We made no finding as to whether we have the authority to permit Comsat to provide aeronautical services via Inmarsat on a non-exclusive basis *(e.g.,* whether other carriers should have some form of direct access to Inmarsat aeronautical capacity). Instead, we initiated this proceeding to consider the institutional, operational and policy questions related to these issues.

12. In the Notice of Proposed Rule Making (NPRM) initiating this proceeding, we tentatively concluded that the public interest would be best served if Inmarsat aeronautical space segment services in the United States are provided on a competitive basis. We proposed that competition be achieved by permitting aeronautical service providers "competitive access" to Inmarsat space segment. That is, authorized U.S. service providers would make arrangements directly with Inmarsat to obtain space segment capacity to use in connection with providing aeronautical service to their customers. Each service provider would be responsible for providing both coast station facilities to access this space segment and connecting facilities to distribute aeronautical communications to its customers. We proposed that this competitive access approach be implemented through a consortium which all U.S. service providers would be required to join. The consortium itself would not own or operate facilities or provide services to customers but rather these functions would be tasked to consortium members.

13. The consortium would be responsible for assuring fulfillment of each member's obligations under the Inmarsat Convention and Operating Agreement. We proposed that the consortium serve as a second U.S. Signatory to Inmarsat in connection with aeronautical services.[13] Under this "dual signatory" approach, Comsat would act as the U.S. Signatory for maritime services and the consortium would act as the U.S. Signatory for the newly added aeronautical services. We recognized that this dual signatory model would require amendments to the Inmarsat Convention and Operating Agreement, which limit each administration to only one Signatory in the organization. We also recognized that the creation of a second U.S. Signatory would require amendment as well to the Maritime Satellite Act. Since these amendment processes would take a considerable amount of time, we proposed an interim arrangement in which Comsat, in its current capacity as sole U.S. Signatory, would act in Inmarsat both on behalf of itself for maritime services and as agent of the consortium for aeronautical services.[14] Finally, we requested comment on whether we could implement an interim arrangement without legislative action.

14. We received initial comments on May 21, 1987 and reply comments on June 10, 1987 in response to the NPRM. By public notice dated November 10, 1988, we invited public comments on the request filed by Comsat on October 28, 1988, for "Immediate Resolution of Rule Making Proceeding and Related Matters" in CC Docket No. 87-75. In this request, Comsat maintained that the Commission may authorize it to provide aeronautical services via Inmarsat as incidental or ancillary to Maritime services which it is authorized to provide by the Maritime Satellite Act.

15. On November 15, 1988, we filed a motion with the U.S. Court of Appeals for the District of Columbia seeking a remand of Case Nos. 87-1077 and 87-1078. The order before the court was our *January 1987 Order* denying Comsat's applications to participate in Inmarsat's aeronautical program. The request for remand did not take a position on the underlying issues in these proceedings. Rather, the purpose of the remand request was to permit us to consolidate post-remand proceedings on the applications with this proceeding. This gives us flexibility to consider those issues raised by Comsat in its October 28, 1988, filing, and the comments submitted in response to that filing, in the context of this proceeding. On November 22, 1988, the Court granted our motion and remanded the matters back to the Commission for further action.

16. Finally, on March 14, 1989, we granted a waiver of the freeze established in our NPRM in this proceeding on the filing of applications to provide international aeronautical mobile satellite services via Inmarsat.[15] The waiver enabled us to accept for filing and place on public notice Comsat's applications to provide aeronautical satellite services via Inmarsat and to procure and construct facilities for the provision of such services. It further enabled petitions to deny and competing applications to be filed by others who believe they may ultimately be authorized to provide Inmarsat aeronautical services. We made it

clear that no aeronautical application would be granted until it is determined who is legally authorized to provide Inmarsat aeronautical services under the Maritime Satellite Act, and under what circumstances such services may be provided. We have accepted for filing applications from Comsat[16] and Arinc.[17] However, they are not part of the deliberations in this proceeding and will be considered at a later date in a manner consistent with our findings herein.

COMMENTS

17. We received comments from a broad range of parties - government agencies, potential aeronautical service providers, communications satellite manufacturers, electronic equipment suppliers, and a user group. The record established in this proceeding reflects divergent views in response both to our NPRM proposal and to alternative proposals and other issues raised by commenters.

A. Government Agencies

18. The National Telecommunications and Information Administration (NTIA) states that competitive access will have public benefits, including competitively priced offerings for users, new business opportunities and negotiating flexibility, and stimulated demand for aeronautical use of the Inmarsat space segment. It believes that the consortium concept is a responsible and necessary mechanism for managing the competitive aspects of participation by U.S. entities in Inmarsat aeronautical activities. However, NTIA opposes the dual signatory aspect of the NPRM proposal. NTIA fears that giving voting rights to a second aeronautical signatory could lead Inmarsat to conclude that the U.S. expects aeronautical services to have the same status as maritime services.[18] Otherwise, it supports the NPRM proposal with certain modifications. It proposes that Comsat be permitted to remain as the sole U.S. Signatory (for purposes of satisfying the Inmarsat requirement of a single signatory per party) but that Comsat's role be modified to ensure full participation by all entities interested in investing in Inmarsat aeronautical space segment. NTIA believes that this can be accomplished by establishing an aeronautical consortium as a subsidiary of Comsat open to all authorized U.S. entities. The purpose of the consortium would be limited to ensuring fulfillment of U.S. obligations under the Inmarsat agreements and to facilitating direct participation by consortium members in Inmarsat aeronautical activities. NTIA believes that establishing the consortium as a subsidiary of Comsat in this manner would also minimize Comsat's costs in the event no other entity chooses to join the consortium.

19. NTIA believes that the Commission has sufficient authority without additional legislation to adopt and implement its modified proposal. However, NTIA is concerned that aeronautical business will be lost to foreign competitors if the United States does not enter the international market in a timely fashion. NTIA therefore urges that the Commission move forward in a manner that permits immediate U.S. entry into the world market prior to resolving pending issues relating to the domestic structure by which U.S. entities may access Inmarsat space segment for aeronautical services. NTIA observes that the record in this proceeding reflects general agreement that Comsat should be one of the U.S. entities that is ultimately authorized to provide aeronautical services via Inmarsat but that the core of the dispute is whether or not the Commission should authorize Comsat as the sole provider of the service. NTIA therefore proposes that the Commission limit its decision at this time to the issue of Comsat's entry into the market, and not resolve immediately the treatment of other potential applicants. According to NTIA, this approach would allow Comsat to enter the U.S. aeronautical market expeditiously, while not foreclosing other prospective U.S. participants from coming forward in the future with proposals to access Inmarsat themselves through a consortium or similar mechanism. The Commission would not decide at this time to authorize or to preclude such a structure.

20. In addition, NTIA agrees with the Commission that Comsat should not be permitted to fund its aeronautical investment with its maritime revenues, and that Comsat should be required to continue separating costs and accounts related to Inmarsat aeronautical activities from other Inmarsat costs and accounts. Further, NTIA urges the Commission to initiate an inquiry into whether there will be a need to regulate the rates Comsat charges for aeronautical services. NTIA suggests that, under competitive market conditions or the threat thereof, the Commission may be in a position to free Comsat from rate regulation of its aeronautical service offerings.

21. The Department of State opposes the dual signatory aspect of the NPRM proposal because: 1) it would require changing the Convention and Operating Agreement, which could take years to accomplish; 2) it would necessitate domestic legislation which could be a difficult and lengthy process; 3) it would establish an undesirable precedent; 4) it would dilute the U.S. voting share on Inmarsat decisions; and 5) it could become unnecessarily cumbersome for both industry and government. Additionally, the State Department is not persuaded that a consortium of joint owners of Inmarsat space segment is essential at this time. It sees little benefit and many disadvantages in a consortium approach. Most importantly, it believes that delay in resolving this proceeding could result in foreign companies gaining a competitive advantage over U.S. companies in the aeronautical satellite service market. State believes the U.S. government should bring aeronautical services to U.S. industry as soon as possible. It therefore supports the grant to Comsat of exclusive access to Inmarsat space segment. It reasons that other U.S. companies can own earth stations and these companies can market Inmarsat aeronautical services competitively to their customers. It also foresees competition to Comsat from satellite systems separate from Inmarsat. The State Department suggests that the consortium concept could be a follow-on solution to be employed should experience indicate that U.S. interests are not being satisfactorily met by other more flexible and timely arrangements to achieve U.S. industry participation. One such arrangement State suggests is the formation of industry advisory groups.

22. The Federal Aviation Administration (FAA) states that there is an immediate need for the Commission to allow a U.S.-based operator to participate in and provide Inmarsat aeronautical services. The FAA is concerned that aeronautical mobile satellite service (AMSS) that meets the needs of civil aviation may not become available in the near future. This service is required to support the implementation of essential air traffic services on both the Atlantic and the Pacific Ocean regions beginning in 1990 and to support engineering trials and demonstrations of

these services between now and the time they will be implemented. The FAA states that Inmarsat is the only known space segment that will be available to support the initial application of AMSS for civil aviation. U.S.-based access to the Inmarsat space segment is therefore of critical importance to the FAA as the domestic regulatory means by which FAA can influence the service offered. Since Comsat is the only operator currently applying for provision of Inmarsat aeronautical services, the FAA supports its request for authority to participate in Inmarsat aeronautical activities. However, the FAA does not endorse Comsat as the sole operating entity for Inmarsat aeronautical services. Rather, the FAA urges the Commission to judge on the merits potential future applications for similar rights, and to generally encourage competition in the provision of aeronautical services via Inmarsat.

23. The Department of Defense (DOD) urges the Commission to expedite resolution of this proceeding. DOD indicates that it has national defense requirements for use of aeronautical services provided by Inmarsat and that such national defense interests could be adversely affected if the provision of aeronautical services via Inmarsat is permitted to be under total foreign control. DOD supports NTIA in urging this Commission to immediately authorize Comsat to serve as the sole U.S. Signatory to Inmarsat for aeronautical as well as maritime purposes. In the longer term, DOD sees no detriment in deferring a decision on a possible domestic structure involving competition in the provision of Inmarsat space segment.

B. U.S. Carriers and Other Potential Service Providers

24. Comsat requests the Commission to authorize it to be the sole provider of Inmarsat aeronautical space segment services consistent with its role as the U.S. Signatory to Inmarsat. Comsat opposes competitive access as unnecessary, unworkable and unlikely to achieve this Commission's objective of competition in the provision of aeronautical services. It argues that competitive access will not result in any public benefits. Specifically, Comsat asserts that competitive access will not result in significant cost savings and increased efficiencies in the provision of Inmarsat aeronautical services. It contends that our competitive access proposal is indistinguishable from the proposals for direct access to Intelsat that we considered and rejected. Comsat also argues that competitive access will require a change in law which would entail substantial delay. It asserts that competitive access is 1) contrary to law because the Maritime Satellite Act provides that only Comsat is to have an ownership interest in and operational responsibility for Inmarsat, and 2) contrary to existing international agreements because a second Signatory to Inmarsat for aeronautical purposes is not permitted. In addition, Comsat argues that any attempts to seek legislation or amendments to international agreements to remedy these problems will substantially delay the introduction of Inmarsat aeronautical services in the United States to the detriment of U.S. consumers and U.S. leadership in Inmarsat. Comsat asserts that other countries will take the lead in capturing the U.S. market by extending Inmarsat aeronautical services to U.S. users through foreign coast earth stations and connecting terrestrial facilities.

25. Comsat also opposes the consortium concept, contending that it would be cumbersome, costly, inefficient and likely characterized by conflict which could not be resolved without governmental intervention into commercial matters. Comsat argues that the Commission would have to be involved extensively in both establishing the consortium and in formulating its operating decisions. Moreover, Comsat believes that membership would lead not to a long-term commitment to Inmarsat, but rather to short-term exploitation of members' special positions in order to develop markets for transfer to non-Inmarsat systems. Comsat states that the proposal of NTIA to modify the consortium framework in the NPRM proposal does not solve the fundamental infirmities of a consortium approach. It claims that there will still be conflicts among the members over the use and development of facilities, and that the principal difficulties inherent in the consortium concept would remain: necessity for governmental intervention, anticompetitive problems of bringing competitors into one organization, conflicts of interest among members, and administrative complexities that attend such a venture. Finally, Comsat opposes creation of dual signatories because such a policy would undermine U.S. leadership and fragment U.S. influence in Inmarsat and would increase the need for governmental intervention.

26. Comsat offers an alternative proposal which it argues would better serve this Commission's objectives. Under its proposal, Comsat would provide customers access to Inmarsat space segment capacity for aeronautical services pursuant to flexible access and pricing arrangements, including options of on-demand service, monthly leased service, and capitalized lease service. These services would be offered under unbundled space segment and earth station tariffs with rates based on costs. Leased capacity could be subdivided, resold, packaged and repackaged, and configured into networks to meet varying customer needs. Customers would be able to either develop their own coast earth stations, use Comsat's coast earth stations or locate ground equipment in Comsat's stations under appropriate (unbundled) space segment tariffs. Comsat further proposes creation of an "advisory committee" consisting of aeronautical industry representatives. Comsat states that the purpose of this advisory committee would be to provide Inmarsat aeronautical information to interested members and to involve these members in the development of U.S. positions within Inmarsat.[19]

27. GTE shares Comsat's concern that a consortium may prove to be unworkable, costly, and potentially anticompetitive. GTE proposes in the alternative that the Commission consider the establishment on an experimental basis of "direct access" to Inmarsat. Under GTE's proposal, a single U.S. signatory would be maintained for U.S. representation within Inmarsat. The signatory would perform these representational services for a reasonable compensatory administrative fee, divided among service providers having "direct access" to Inmarsat space segment facilities. Under GTE's direct access concept, Inmarsat aeronautical capacity would be offered to any service provider prepared to make an investment corresponding to its usage of the INMARSAT system. This investment could take the form of capitalized leaseholds or investment interests in the U.S. signatory's share of Inmarsat aeronautical space segment facilities and could be freely transferred. The providers would participate in the instructional process meetings between the signatory and the U.S. government. GTE, however, while supporting the eventual development of this "true direct access proposal," states that consideration should also be given to Comsat's current proposals to offer unbundled pricing and investment options. Finally, GTE opposes the dual

signatory aspect of the NPRM proposal. It fears that the dual signatory approach will dilute the total U.S. voting strength and complicate the instructional process.

28. The American Mobile Satellite Consortium (now American Mobile Satellite Corportion (AMSC) does not object to Comsat being authorized as sole Signatory to Inmarsat and sole provider of Inmarsat aeronautical space segment as long as such authorization doesn't impede AMSC's stated goals. These goals include gaining access to Inmarsat for interim capacity pursuant to a lease now being negotiated and also being assured that Article 8 of the Inmarsat Convention will be applied only to those satellite communications of AMSC that are clearly maritime.

29. API believes that the NPRM proposal offers a means to fulfill unsatisfied communications requirements. It supports a consortium but requests the Commission ensure that no single entity dominates the consortium by monopolizing access to Inmarsat space segment.

30. MCI supports, in principle, the NPRM proposal to competitively restructure access to Inmarsat aeronautical services. However, it believes that the extent to which competition will actually develop will depend on the operational details of any new structure. MCI states that, although substantial uncertainty exists as to the best mechanism for encouraging competition, as a general rule increased participation by interested carriers will improve the Inmarsat decisionmaking process relating to aeronautical services. MCI believes that such a cooperative effort will provide all interested parties with a vehicle for influencing Inmarsat decisions which will directly, and significantly, affect their investments and their competitive posture. However, MCI states that the entity performing the signatory function should bear no affiliation to any of the service providers. It therefore questions NTIA's proposal that the consortium be structured as a subsidiary of Comsat and suggests that structural separation within Comsat would not provide an adequate barrier to cross-subsidization and anticompetitive behavior.

31. OTI states that competitive access will result in important consumer and competitive benefits by reducing the cost to carriers of acquiring space segment, by enabling carriers to offer aeronautical services to users at lower rates, and by encouraging the use of the Inmarsat system for aeronautical services. It supports the consortium approach as a viable mechanism to promote competition. It sees the consortium as a means of avoiding problems which might arise if Comsat is permitted to provide aeronautical services directly to customers as well as become the exclusive provider of aeronautical space segment capacity to carriers.

32. Arinc maintains that the Maritime Satellite Act does not authorize U.S. participation in any Inmarsat activity other than maritime services and that the U.S. cannot accept the amendments to the Inmarsat Convention to permit Inmarsat to offer aeronautical services until Congress has authorized U.S. participation in Inmarsat for this purpose. Arinc disagrees with NTIA that the Commission has the authority to implement competitive access absent congressional action. It believes that Congress should decide whether and how the U.S. should interconnect with Inmarsat's nonmaritime services and that it is premature for the Commission to issue an order before Congress reviews these issues. Further, Arinc believes that competitive access to Inmarsat aeronautical services cannot be achieved within the present institutional structure. It believes that under a true "direct access" arrangement there would be no U.S. Signatory to Inmarsat and that U.S. entities would simply become non-signatory users and pay the applicable utilization charges for Inmarsat.

33. If the Commission moves ahead to authorize Inmarsat aeronautical services, Arinc urges that we do so through non-exclusive or "competitive access" to Inmarsat aeronautical space segment. Arinc claims that the Maritime Satellite Act precludes Comsat from being named the sole supplier of Inmarsat aeronautical services. Arinc further argues that Comsat's "public policy" claim for sole provider status *(e.g.,* to compete credibly with foreign providers) is exaggerated and based on unduly pessimistic assumptions. Arinc believes that competitive access can be achieved through a joint venture, which it calls AVCO. AVCO would be comprised of Comsat and other interested U.S. entities.[20]

34. Arinc views its AVCO proposal as essentially a hybrid of the competitive access/consortium proposal and the "interim arrangement" proposal that were put out for comment in the NPRM. Under AVCO, Comsat would be permitted to remain the sole U.S. Signatory to Inmarsat for purposes of satisfying the single Signatory per Party requirement of the Inmarsat Convention. Arinc states that Comsat's Signatory role, however, would be very different from what it is today. Comsat would be required to provide structural separations between its aeronautical and maritime Inmarsat activities. The structurally-separated aeronautical division of Comsat would, along with all authorized U.S. entities (carrier and non-carrier) who desire to provide aeronautical services via Inmarsat, become a member-owner of AVCO.

35. Arinc states that AVCO would assume all U.S.-based Inmarsat aeronautical functions, and make all decisions relating to Inmarsat aeronautical activities, and ensure that its members comply with the obligations of the U.S. Signatory. However, AVCO would neither engage in the provision of aeronautical services nor own or operate ground earth stations. Arinc states that AVCO and a Comsat subsidiary (maritime) called Comsat Maritime would make all management and operational decisions for the U.S. Signatory to Inmarsat. Comsat would represent AVCO and Comsat Maritime before Inmarsat, and would exercise all decision making and operational functions. It would act as the trustee for AVCO's investment in Inmarsat – *i.e.,* as an instrument for a flow-through of AVCO's rights, duties, and responsibilities vis-a-vis the INMARSAT Operating Agreement. Comsat would attend Inmarsat Council meetings accompanied by a representative from AVCO. As Comsat would remain the U.S. Signatory to Inmarsat, the Inmarsat Convention's requirement for a sole signatory would be satisfied. Finally, in the alternative, Arinc believes that the Commission could adopt an approach which permits an expeditious grant of authorization to Comsat to provide Inmarsat aeronautical services while commiting to implementation of a competitive access scheme at a later date.

36. Fedex supports competitive access to Inmarsat aeronautical space segment. It states that Comsat's "middleman" role in providing fixed satellite services via Intelsat has resulted in needlessly increased costs to Intelsat customers through Comsat's excessive markings in utilization charges. It urges the Commission to resolve this Rule Making promptly in order to foster development in the United States of international aeronautical satellite com-

munications. However, it takes no position regarding which entity or entities should provide aeronautical satellite service to end users.

C. Satellite Manufacturers, Electronic Equipment Suppliers and User Groups

37. Ford Aerospace Corporation (Ford) supports Comsat as sole Signatory and sole provider of Inmarsat aeronautical space segment services. Ford believes that we should expeditiously authorize Comsat to prevent the U.S. from losing its leadership position in the design, manufacture and operation of international mobile satellite communications equipment and services. Ford reasons that absent such a grant foreign entities would supply these services and those foreign entities would not likely make procurements from U.S. companies. Ford estimates loss of this market to foreign sources at $330 million. Ford further argues that U.S. traffic should be accommodated by U.S. companies using U.S. earth stations in order to assure safety of flight.

38. Hughes Network Systems (Hughes) urges this Commission to act expeditiously on Comsat's request to be named sole Signatory for Inmarsat aeronautical as well as maritime service. Hughes is concerned that unless the U.S. acts promptly and decisively to resolve the U.S. domestic regulatory situation, the United States may lose its technological edge in this new service. Hughes also believes that U.S. manufacturers and suppliers may be disadvantaged in domestic and world markets by any delay.

39. Ball Communications Systems (Ball) urges the Commission to authorize as soon as possible Comsat's participation in Inmarsat's aeronautical satellite communications service. Ball states that any delay will likely result in service being provided to U.S. end users by foreign entities - a situation not in the best interest of the United States.

40. Finally, the National Business Aircraft Association (NBAA) supports granting immediate authorization to Comsat to allow it to provide service to aeronautical customers via the Inmarsat system. NBAA suggests regulatory delay would hamper development of safety related communications and risk further erosion of U.S. preeminence in aviation and avionics development.

DISCUSSION

41. This Rule Making was instituted to address how Inmarsat aeronautical services should be provided within the jurisdiction of the United States. We stated in our *January 1987 Order* (which is now before us again on remand) and reemphasized in our *NPRM* that the provision of aeronautical services via Inmarsat will result in the availability of commercial and safety related satellite services not currently available to civil aviation users and consequently would be in the public interest. In this proceeding we are establishing a domestic structure by which U.S. aeronautical service providers may access Inmarsat space segment to provide such services. We have considered comments on the access proposal that we made in our NPRM and on the possibility of establishing Comsat as the sole U.S. operating entity with access to Inmarsat aeronautical space segment as ancillary to its role as the U.S. Signatory and sole operating entity for Inmarsat maritime services.

42. In our decision in this proceeding, we reaffirm our tentative conclusions that the provision of Inmarsat aeronautical services will be in the public interest. We further determine that such services are best suited to satisfy communications requirements of aircraft in international flight. Additionally, we conclude that the public interest will not be served by adopting the competitive access/consortium approach that we proposed in the NPRM. Instead, we find that, on balance, the best way to promote competition among U.S. service providers, while ensuring timely and effective U.S. entry into a very competitive world market, is to authorize access to Inmarsat aeronautical space segment through Comsat as the U.S. Signatory to Inmarsat. We believe that this approach is fully consistent with the International Maritime Satellite Telecommunications Act.

A. Need for U.S. Participation in Inmarsat Aeronautical Services

43. Some of the comments that we received raise fundamental issues relating to the extent to which we should authorize any Inmarsat aeronautical services in the United States. The MSS Commenters, Arinc and GTE question the extent to and the conditions upon which Inmarsat aeronautical services should be permitted in the United States. We will first address these issues and then turn to those raised by our NPRM proposal.

44. The MSS Commenters state that Inmarsat should be allowed to provide only "international" aeronautical services which they see as a reasonable supplement to its traditional maritime role. They believe Inmarsat is well-suited to such an "international" role and may also be a possible provider of "domestic" communications services to certain nations that either do not have sufficient internal demand to justify building their own satellite systems or do not have other satellite facilities suitable for domestic use. They would not permit, however, Inmarsat to provide permanant aeronautical "domestic" communications services within the United States. They aver that permitting U.S. carriers to provide via Inmarsat such permanent domestic services within the United States would take a vital domestic communications system out of the control of U.S. entities, encourage inefficient use of the spectrum, and undermine the financial integrity of a Commission-authorized U.S. domestic system providing aeronautical services.

45. Arinc, on the other hand, argues that there should be no definitional distinctions between "international" and "domestic" aeronautical satellite services. Arinc believes such distinctions are not practical from an operational perspective, not justifiable economically, and not technically efficient. Arinc reasons that aeronautical communications, by their very nature, are almost all "international." For example, U.S. air carriers originate "international" flights from many inland hub airports, *e.g.*, Chicago, Kansas City, Atlanta, Denver, to name a few. Even flights that originate and terminate from U.S. points, such as the case of Miami to New York, could traverse the national airspace of several soverign nations, and spend a good deal of flight time over international waters. Arinc argues that domestic/international distinctions would lead to requirements for a "hand-off" between satellite systems which it finds unacceptable. Arinc states that even if such a "hand-off" were technically feasible, it would occur at a critical time when aircraft approaching U.S. shores enter new flight tracking regions -- precisely

when uninterrupted communications are most vital. Arinc feels this does not make operational sense and could create safety hazards. It further concludes that mandating such a distinction would violate the Commission's long standing policies favoring competition. Arinc believes that the marketplace is best suited to decide whether a particular user of aeronautical satellite services will choose a "domestic" or an "international" space segment provider.

46. The American Mobile Satellite Consortium (AMSC) disagrees with Arinc's position. AMSC argues that Inmarsat should not be permitted to serve on a permanent basis aircraft flying in U.S. airspace, regardless of whether the flight is international or domestic. AMSC avers that if the aircraft is in the airspace of a particular country, its communications are "domestic", regardless of their destination; if the aircraft is in international airspace, then its communications are deemed to be international. AMSC believes that to permit otherwise would significantly reduce the amount of spectrum available to the U.S. domestic mobile satellite system. AMSC foresees that the FAA or its agent will use the AMSC system for all aircraft flying over U.S. airspace and that "hand-offs" between AMSC and Inmarsat or other satellite systems will be fully feasible technically.

47. Arinc and GTE question whether Inmarsat aeronautical services should be permitted in the U.S. at all and contend that certain restrictions should be imposed if such services are permitted. The purpose of such restrictions would be to guard against Inmarsat using its monopoly position in the maritime area to engage in anticompetitive practices. Arinc contends that Inmarsat should be permitted to provide aeronautical serivces only if: 1) it establishes a separate subsidiary to provide such competitive aeronautical services; or 2) the organization abandons the monopoly protection afforded to its maritime services. Arinc also states that the United States must condition U.S. participation in Inmarsat's competitive services on its owners agreeing to open market entry for the provision of those services in all member-nations.

48. GTE is concerned that provision of aeronautical satellite services by Inmarsat may result in a *de facto* monopoly[21]. It fears that Inmarsat may have inherent advantages over future U.S. domestic entrants. It believes that there is too little reliable information to know whether the aeronautical market will support one system or more than one. GTE states that if the Commission and Congress permit Inmarsat to provide "initial interim service," the Commission must establish regulatory safeguards to ensure that Inmarsat plays by the same procedural and technical rules as domestic providers. It also states that the services that Inmarsat is permitted to provide should be defined specifically and made subject to the same regulatory requirements (both technical and procedural) that are applied to services of non-Inmarsat providers.

49. We stated in the NPRM that the provision of various Inmarsat aeronautical services to the United States would be in the public interest. We continue to hold this view. Inmarsat's proposed program will result in the provision of commercial and safety satellite services which are not currently available to civil aviation users. These services will include search and rescue services, air-to-ground links for the transmission of airlines operational communications, in-flight performance monitoring data, meteorological information, air traffic control services, and public telephone and data services.

50. The comments that we have received in this proceeding demonstrate not only the benefits that will result from making Inmarsat aeronautical services available to the U.S. aeronautical community, but also the need to expeditiously move ahead in view of potential foreign competition. Many parties urge the Commission to act promptly so that potential U.S. service providers do not lose market opportunities to foreign service providers while U.S. regulatory issues are being resolved. Their concerns are expressed in terms of maintaining U.S. leadership in manufacturing and equipment supply as well as service development. There is a particular concern that U.S. commercial and government aviation communications needs not become dependent on foreign service providers. The FAA emphasizes that Inmarsat has the only known space segment that will be available to provide aeronautical mobile satellite service (AMSS) to meet civil aviation needs in the near future and that U.S.-based access to Inmarsat is therefore critical to the FAA. The FAA believes that it is unacceptable from the standpoint of promoting U.S. aviation industry interests, national security, and aviation safety to allow a vital U.S. communications link to fall to non-U.S. facilities. Similarly, DoD states that there are national defense requirements that will be provided by Inmarsat and U.S. national defense interests could be adversely affected if the provision of these services is under foreign control.

51. In view of these comments, we believe that we should adopt a policy which will best promote and protect U.S. interests in the development of aeronautical satellite services by ensuring the early introduction of Inmarsat aeronautical services to the U.S. aeronautical community. Additionally, this policy must consider the scope of services to be provided in the United States via Inmarsat. Specifically, it must define the relationship between Inmarsat and the domestic MSS system that we are today authorizing to provide a broad scope of mobile satellite services, including aeronautical services.[22] On this matter, we conclude that Inmarsat should provide primarily international aeronautical mobile satellite services to the United States.[23] We believe that defining Inmarsat's scope of operations in this manner is consistent with our decision allocating frequency spectrum to mobile satellite services in the United States[24] and our decision mandating a single consortium to construct and operate a dedicated domestic mobile satellite system in that spectrum.[25] Additionally, we view this approach as consistent with the traditional role Inmarsat has played within U.S. telecommunications policy - that of providing satellite capacity for communications that are international in character.[26] However, we believe that an aircraft in international flight should have the option of continuing to use the Inmarsat system even after it enters U.S. air space, as discussed below.

52. We will thus authorize the use of Inmarsat aeronautical facilities in the United States for communications to aircraft that are in international flight, both for AMSS(R) functions and non-AMSS(R) functions *(e.g.* airline passenger communications).[27] We will authorize the use of Inmarsat aeronautical services via U.S. aeronautical earth stations for aircraft in flight: (1) from the United States to a foreign point; (2) from a foreign point into the United States; and (3) between any two foreign points.[28] Aircraft

in international flight may also use the domestic mobile satellite system to the extent the coverage area of that system permits. Aircraft in flight between two U.S. domestic points may use only the domestic mobile satellite system for satellite communications to the extent the coverage area of that system permits.[29]

53. Additionally, we will require both our MSS licensee (*i.e.* AMSC) and authorized providers of Inmarsat services to establish appropriate arrangements for handing off traffic between the two systems for both AMSS(R) and non-AMSS(R) communications.[30] For non-AMSS(R) communications, we leave development of the specifics of these arrangements to our licensees and their prospective customers. For AMSS(R) requirements, we expect our licensees to closely coordinate with the FAA to assure that the AMSS(R) hand-off arrangements are consistent with applicable FAA policy and regulations.[31] In this connection, we expect that the hand-off procedures between the various systems will be developed by various aeronautical standard setting organizations and that Commission licensees will comply with those standards recognized by the FAA. Our intent is to insure that mobile satellite systems will be developed with appropriate standards to maintain the integrity and the reliability of AMSS(R) communications when both the domestic MSS system and the Inmarsat system are used to satisfy the operational and safety requirements of aircraft. Thus, aircraft in international flight, as defined above, will be able to use Inmarsat throughout the duration of the flight or may have its traffic handed off to the U.S. domestic system depending on its particular operational and safety needs. Under these circumstances, we believe that aircraft in international flight will be provided flexibility in establishing reliable means to satisfy their air traffic control and operational communications requirements.

54. We disagree with Arinc that an international/domestic distinction does not make operational sense. Terrestrial aeronautical safety services are currently handed off between different sectors in the United States and between the U.S. airspace and other countries' airspace. We recognize that hand-off procedures between satellite systems have yet to be developed for aeronautical mobile satellite services.[32] Accordingly, our policy for aircraft in international flight is designed to accord flexibility in the use and timing of hand-off procedures. We believe this approach should satisfy Arinc's concerns about safety.

55. Further, aircraft communicating with U.S. aeronautical earth stations via Inmarsat aeronautical space segment, and aircraft flying within U.S. airspace communicating with non-U.S. aeronautical stations via Inmarsat space segment, must comply as appropriate with the Table of Frequency Allocations in Section 2.106 of the Commission's Rules and Regulations. This table provides a fixed satellite service allocation which is permitted for the aeronautical earth station/satellite portion of the link (feeder links). This table allocates for the mobile unit/satellite portion of the links the bands 1549.5-1558.5 MHz and 1651-1660 MHz as shared between mobile satellite service (MSS) and aeronautical mobile satellite service (AMSS(R)), with AMSS(R) having priority and real time preemptive access in accordance with Footnote U.S. 308. The bands 1545-1549.5 MHz and 1646.5-1651 MHz are allocated to mobile satellite service (MSS) on a secondary basis with respect to AMSS(R). Therefore, Inmarsat non-AMSS(R) communications (e.g., airline passenger communications) must be provided as a mobile satellite service (MSS) and comply with co-primary or secondary status of such service as applicable as well as provide priority and real-time preemptive access to AMSS(R) when an aircraft is located within U.S. airspace.

56. As to Arinc's concerns that Inmarsat will use its monopoly status in the provision of maritime space segment to subsidize its efforts in providing competitive aeronautical services, we will continue our current practice of reviewing Inmarsat aeronautical service and rate proposals as well as corresponding tariffs by any entity authorized to provide such service in the United States. If we determine that unfair competitive practices are present, we can take appropriate action in the instructional and/or regulatory forums. We believe that Arinc's proposal that Inmarsat be required to establish a separate subsidiary to provide aeronautical services is unwarranted. We question whether a separate subsidiary would provide the protections desired by Arinc. Further, it would require an amendment to the Inmarsat agreements and would likely be opposed by other Inmarsat members. And, even if achievable, it would delay the introduction of Inmarsat aeronautical services by U.S. service providers. No other party in this proceeding supported this proposal.

57. As for GTE's concern that the Inmarsat organization (as distinguished from U.S. providers of service over Inmarsat) be made subject to the same technical standards and licensing procedures as domestic satellite applicants, we emphasize that the Commission does not have direct licensing jurisdiction of Inmarsat spacecraft. U.S. influence over Inmarsat spacecraft design and operation is primarily through its participation in the Inmarsat Assembly of Parties and oversight of the U.S. Signatory to Inmarsat as provided in the Maritime Satellite Act. Commission control over Inmarsat's aeronautical operations in the United States is through approval of Signatory participation in Inmarsat procurement of space segment and through allocation of frequencies and licensing of earth stations that access Inmarsat space segment. Through these processes, the U.S. can take appropriate actions available to attempt to prevent or ameliorate the effects of any unfair competition.

B. Form of U.S. Participation in Inmarsat Aeronautical Services

58. The comments that we have received in response to the NPRM consortium/competitive access proposal are mixed. The competitive access aspect of our proposal received general support from NTIA, Arinc, OTI, and API; qualified support from GTE, MCI and FAA; but no support from Comsat, the State Department, Ball, Ford and AMSC. Some commenters believe that instituting "competitive access" would weaken the U.S. vis-a-vis foreign competition. NTIA and others believe that resolution of this issues should be deferred until after Comsat has been authorized and U.S. users have a domestic source of Inmarsat aeronautical capacity. The consortium concept that we proposed to implement competitive access received both opposition and support from various parties. In addition, it generated several alternative proposals. There is virtually no support for the dual signatory aspect of the NPRM proposal.

59. After reviewing the comments filed in this proceeding, we conclude that our NPRM proposal is not the best means of achieving the timely and efficient delivery of Inmarsat aeronautical services at reasonable prices. Specifically, we conclude that it would not be in the public

interest to adopt at this time a policy which provides direct investment in Inmarsat space segment capacity through a consortium of U.S. authorized aeronautical service providers. We reach this conclusion for several reasons. First, public interest benefits of the NPRM competitive access/consortium proposal have not been clearly demonstrated by the record in this proceeding. Whatever theoretical benefits that may result from this approach are outweighed by the problems associated with it. Second, the complexities associated with creation of a consortium would require extensive U.S. government oversight to ensure fulfillment of U.S. obligations under the Inmarsat agreements. Additionally, the lack of support for the dual signatory aspect of our proposal would further complicate implementation of competitive access in a manner that will ensure fulfillment of U.S./Inmarsat obligations. Third, while the comments reflect support by several parties for a competitive access policy, there is no clear private sector commitment to participate in an aeronautical consortium. Fourth, we believe that U.S. policy should be designed to ensure timely and effective U.S. entry in the international aeronautical satellite communications market in response to foreign competitors both in service and equipment areas. We conclude that this goal would be impeded if the U.S. were to embark on the creation of a cumbersome competitive access/consortium arrangement that would take time to structure, delay U.S. entry into the world market, and unnecessarily inhibit U.S. competitive posture. Such unnecessary delay would allow foreign competitors to move ahead and capture potential U.S. markets. Finally, the record in this proceeding does not demonstrate that a competitive access scheme is necessary to achieve meaningful competition in the provision of Inmarsat aeronautical services. Absent a clearly demonstrated public interest requirement for imposition of a competitive access approach, there is no reason to require the creation of a consortium to implement such an approach.

60. *Lack of Public Interest Benefits.* The parties in this proceeding which support a competitive access scheme generally believe that competitive access would result in lower customer costs, greater customer choice of suppliers, and a wider range of available services. As described above, some parties have proposed variations of the NPRM proposal to achieve these goals. While our objective in this proceeding continues to be promotion of competition in the provision of Inmarsat aeronautical services, we believe that competitive access to Inmarsat aeronautical space segment is neither necessary nor desirable for this purpose. Our findings on this issue apply to the alternative proposals made by parties in this proceeding as well as our NPRM proposal.

61. We find that potential customer savings under competitive access will be illusory. The record in this proceeding provides no basis to conclude that consortium members would realize lower costs by obtaining Inmarsat aeronautical space segment capacity under a competitive access arrangement. No cost savings would result from those categories of costs that Comsat normally incurs in its current capacity as U.S. Signatory and sole provider of Inmarsat space segment capacity for maritime services. Under a competitive access scheme, each consortium member would be responsible for a proportionate share of the U.S. Signatories share of aeronautical-related capital requirements and operational depreciation and maintenance expenses that must be paid to Inmarsat.[33] However, no cost savings to consortium members would be realized from this arrangement since costs would simply be redistributed among Comsat and other consortium members and not reduced.[34] Further, while savings arguably could result because independent service providers would not have to obtain space segment from Comsat and pay Comsat's rate of return on its investment in Inmarsat, those service providers would incur their own costs of capital for their share of Inmarsat investment. These costs of capital in turn would have to be passed on to their customers. No proponent of competitive access in this proceeding has provided any evidence that such cost of capital differential would be substantial. While it is possible that competitive access might lead to lower prices, the comments that we have received are general in nature and fail to provide specific information upon which we can rely to find evidence of substantially lower rates to customers. Further, even if it could be determined that substantially lower rates would result, they have to be weighed with the problems discussed in this order associated with a competitive access/consortium approach.

62. Further, it is not clear how a competitive access scheme would necessarily result in greater customer choice of aeronautical service providers. The number of aeronautical service providers entering the U.S. market will be determined by factors other than just the mechanism by which service providers access Inmarsat aeronautical space segment. If substantial customer demand exists, we expect U.S. service providers to enter the market to satisfy that demand and to further develop the market.

63. It also is unclear how competitive access would necessarily lead to a wider range of service options. The manner in which Inmarsat space segment is to be used for aeronautical services will be determined by the Inmarsat Council, of which the U.S. Signatory is a member. The U.S. Signatory represents the United States on the Council and has a voting participation on the Council basically equivalent to the investment share it represents (currently at 25 percent, the largest on the Council). A member's investment share largely is determined by its relative usage of the Inmarsat system. A competitive access scheme will not change U.S. voting strength on the Council or enhance the ability of the United States to influence the types of aeronautical services that may be available via Inmarsat.[35]

64. In sum, we conclude that the record in this proceeding does not demonstrate that competitive access to Inmarsat space segment will result in significant public benefits. The perceived benefits of competitive access to Inmarsat aeronautical space segment are generally either speculative or theoretical. Further, whatever benefits that may result from competitive access are outweighed by the problems discussed below that would be associated with its implementation.[36]

65. *Undesirable complexities in implementation.* We conclude that there would be significant financial and operational complexities associated with creation of a consortium to implement competitive access in a manner consistent with U.S. obligations under the Inmarsat Convention. These complexities would be further exacerbated if the consortium were not given status as a second Signatory for aeronautical matters. The dual signatory aspect of the NPRM competitive access/consortium proposal is important to the successful implementation of the proposal since it would have made consortium members directly responsible for fulfillment of U.S. Inmarsat (aeronautical)

obligations. However, it is clear from the objections of NTIA and the Department of State and other parties that a dual signatory approach is not feasible in view of the difficulties associated with amending the Maritime Satellite Act and the Inmarsat Convention to provide for dual signatories. Without a dual signatory framework, we believe that an unnecessarily complicated arrangement would have to be fashioned to define the relationship between the aeronautical consortium and Comsat, which would remain as the sole U.S. Signatory to Inmarsat. It is the U.S. Signatory that Inmarsat would look to for fulfillment of U.S. financial and operational obligations under the Convention and the Operating Agreement. While the dual signatory aspect of our competitive access/consortium approach would have placed the same level of commitment and financial obligation on all consortium members, this will not be the case if we impose competitive access absent the dual signatory aspect of the proposal. Comsat would be responsible within Inmarsat for fulfillment of all U.S. financial obligations to the organization, and would have to look to each consortium member for its share of those obligations. We question whether it would be sound policy to create a consortium in which one member, Comsat, must directly bear the risk of investment in Inmarsat space segment and assume the obligation to pay all U.S. space segment utilization charges on behalf of the other members.

66. Furthermore, it is unclear what Inmarsat-related costs would be attributed to aeronautical consortium members as opposed to costs attributed to Comsat's maritime business. Consortium members would in theory pay only for space segment and other investment costs attributable to aeronautical services. However, the great bulk of investment that Comsat has made over the years in Inmarsat second generation satellites, as well as the planned investment for the third generation of satellites, is for capacity that is common to both aeronautical and maritime services. The U.S. share of these common investment costs would have to be allocated between aeronautical and maritime functions. We recognize that we will need to review the mechanism for allocating these costs whether or not we adopt a consortium approach. However, because of the potential adversarial roles of Comsat and consortium members, there would be a need for a much greater level of Commission intervention on cost allocation issues in a consortium framework than otherwise to deal with allegations of conflicts of interest.

67. From the standpoint of U.S. representation in Inmarsat, competitive access presents additional problems. Comsat's Signatory role involves formulating policy and taking decisions at Inmarsat Council meetings with other Inmarsat members. However, it is clear that aeronautical and maritime issues that will be considered by the Council will not necessarily be separate and distinct. Thus, it would be difficult to develop a workable method for assigning responsibility between Comsat for maritime matters and the consortium (which might include Comsat) for aeronautical matters. Further, it would be difficult to give the aeronautical consortium controlling interest in any spacecraft matter since control normally follows investment and the consortium is likely to have a minority investment, at least in the near future. Finally, allowing both Comsat and the aeronautical consortium to send representatives to Council meetings sets up the potential for divergent positions to be lobbied by Council members and the potential for the whipsawing of the U.S. delegation by competing foreign interest.

68. In view of these problems, continuous U.S. government oversight would be necessary to ensure the timely implementation and smooth functioning of a competitive access/consortium arrangement. As discussed below, we find a lack of clear commitment for a consortium by potential U.S. service providers. This lack of commitment, along with the concerns expressed by parties in this proceeding about Comsat having a potentially dominant role in a consortium strongly indicates that active and ongoing Commission intervention in the creation and operation of a consortium would be necessary to assure fulfillment of U.S. obligations under the Inmarsat agreements.

69. *Lack of clear private sector commitment.* The record in this proceeding does not establish private sector commitment to the NPRM proposal or any of the alternative proposals in the comments. No potential service provider has stated that it would participate in an aeronautical consortium if we require its creation. There are sharply divergent views on whether a consortium would be viable in an international setting. Comsat, GTE, Ford, NBAA, and Hughes directly oppose the consortium approach as unworkable. Arinc, which supported the consortium concept, did so with qualification and with no commitment to participate even in the variation it proposed. Similarly, other commenters supporting the consortium concept do so with major qualifications and no firm commitment to join.[37]

70. We view the lack of consensus on key issues as significant in an international setting. First, the commercial viability and ultimate success of a consortium would require a clear commitment from all potential members. The kind of internal disagreements and disputes that would likely result here would be harmful to U.S. prospects in the very competitive international market. Second, the enthusiastic support and cooperation of consortium members would be critical to the successful implementation of a competitive access scheme since it would require complicated arrangements both to assure U.S. fulfillment of financial obligations to Inmarsat and to provide for multiple participants in the U.S. Signatory delegation to Inmarsat meetings.

71. The record in this proceeding, however, reflects disagreement even among supporters of a consortium arrangement on important issues relating to the formation and operation of the consortium. For example, while virtually all parties oppose designating the aeronautical consortium as a second signatory, these parties disagree as to how investors in an aeronautical consortium can be adequately represented by a single signatory. Specifically, no party has proposed a mechanism to resolve disputes within a single maritime/aeronautical Signatory of potentially conflicting U.S. aeronautical and maritime interests absent extensive governmental oversight and control of that Signatory.[38] In addition, several parties have echoed this concern that no one participant be permitted to dominate the consortium. These and other contentious issues suggest that creation of an aeronautical consortium would occasion delays, involve uncertainties in implementation and operation, and require significant Commission involvement in resolving disputes between members in order to ensure fulfillment of U.S. obligations under the Inmarsat agreements.

72. *Need for timely and effective U.S. market entry.* We conclude that U.S. policy should be designed to ensure timely and effective U.S. entry into the market for international aeronautical satellite communications services. This market is highly competitive even in its developmental stages. As NTIA points out, since access to Inmarsat space segment will be provided by each Inmarsat Signatory to aircraft as well as ships, competition for retail business to end users will exist between Signatories otherwise cooperating in the wholesale end of the business, namely providing Inmarsat space segment. It is therefore important for those Signatories seeking to provide aeronautical services to establish early on their capability and credibility in order to capture as large a share of the world market as possible. To this end, two foreign consortia have been formed among Inmarsat Signatories to provide aeronautical service via Inmarsat. One consortium is comprised of the United Kingdom, Norway and Singapore and the other is comprised of France, Canada and Australia. Each has begun to procure equipment, test systems, and market services on a worldwide basis to airlines. The British Telecom International (BTI) SKYPHONE service is currently undergoing trials and is scheduled for full commercial service in 1989.[39] In addition, the French-Canadian-Australian consortium has entered into an arrangement with SITA to provide aeronautical services worldwide.[40] SITA plans to market safety and passenger satellite communications services via Inmarsat to its members, which include most national and international airlines. The agreements it entered into in 1987 with the French-Canadian-Australian consortium members provide for cooperation towards the provision of a full range of aeronautical services worldwide to airlines and aircraft operators.[41] Finally, SITA and Arinc are considering entering into a joint venture agreement for the purpose of operating a worldwide AMSS network to serve airline operational and safety needs.[42] We understand that arrangements under consideration may involve the use of Inmarsat and other systems. It is unclear at this time whether the arrangements would involve the marketing of Inmarsat service to U.S. airlines in international flight via non-U.S. aeronautical earth stations. In any case, we will require specific applications to be filed later and act on these requests consistent with the policies established herein.

73. Failure to resolve the issues in this proceeding in a manner that ensures immediate U.S. entry into the market could result in loss of market opportunities to U.S. service providers. For example, unnecessary delay in authorizing a U.S. service provider may force U.S. airlines and equipment suppliers now seeking to conduct tests of aeronautical antennas to seek service from foreign sources.[43] The FAA believes that there must be a regulatory means by which it can influence aeronautical mobile satellite services (AMSS) used for aviation safety communications to ensure that AMSS satisfies aviation safety needs. The FAA is working with airlines and manufacturers to develop and implement Automatic Dependent Surveillance (ADS).[44] The FAA desires that engineering trials and demonstrations via Inmarsat that are necessary for implementation of ADS service by 1990 be done through a U.S. service provider. Thus, the FAA seeks immediate U.S.-based access to Inmarsat for this purpose. It contends that it is unacceptable from the standpoint of promotion of U.S. aviation industry interests, national security, and aviation safety to allow a vital U.S. communications link to be provided through non-U.S. facilities. Similarly, DOD states that it has national defense requirements that it seeks to have satisfied through Inmarsat aeronautical services and that U.S. national defense interests could be adversely affected if the provision of these services is under foreign control. Accordingly, DOD urges that the Commission proceed in a manner that will ensure that these services be provided through a U.S. owned and controlled entity. Finally, as evidenced by the comments of Ford Aerospace, Hughes Network Systems, and Ball Communications Systems, failure to adopt a policy that will lead to timely and effective U.S. entry into the international aeronautical services market ultimately could harm the ability of U.S. suppliers to compete in the worldwide market for the design, manufacture and supply of mobile satellite communications equipment and the provision of services. All three parties urge the Commission to expeditiously resolve the issues in this proceeding so that U.S. manufacturers and suppliers will not be disadvantaged by the lack of a strong U.S. presence in the market to respond to foreign competition.

74. We conclude that pursuing a competitive access/consortium arrangement would be ill-advised under these circumstances. The problems, delays, and continued uncertainties associated with implementing such an arrangement likely will result in diminished credibility of U.S. service providers in the face of strong organized foreign competition.[45] This ultimately will lead to a weak initial U.S. position in the service market. It also will require U.S. service providers and equipment suppliers to play "catch up" to their foreign competitors which may be difficult if airline service and equipment contracts initially go to foreign suppliers. Thus, we believe that U.S. policy requires strong and effective U.S. leadership role in Inmarsat in order to ensure prompt U.S. entry into the market for international aeronautical services, to promote the interests of U.S. service providers and equipment suppliers and to safeguard U.S. national security and aviation safety interests. We conclude that a consortium is not the policy instrument to achieve this result in view of both the inherent delays in implementation and the uncertainties in operation of a consortium.

75. *Access to Inmarsat aeronautical space segment through the U.S. Signatory.* Upon review of the record in this proceeding, we conclude that the public interest would best be served by adoption of a policy authorizing the U.S. Signatory, Comsat, to provide Inmarsat aeronautical services as ancillary to its provision of maritime services. Under this policy, access to Inmarsat aeronautical space segment by other U.S. service providers would be through Comsat. We believe that this approach is the best means of both promoting competition in the provision of Inmarsat aeronautical services and achieving timely and effective U.S. entry into this market. Additionally, requiring Inmarsat aeronautical capacity to be accessed through the U.S. Signatory is consistent with the established institutional and operational requirements of the Inmarsat Convention and Operating Agreement. The U.S. will not have to seek any amendments to those documents or the Maritime Satellite Act.[46] Neither will the Commission have to fashion and monitor complex arrangements between the U.S. Signatory and other U.S. aeronautical service providers in order to ensure fulfillment of U.S. obligations under the Inmarsat agreements.

76. As the U.S. Signatory and operating entity, Comsat will be responsible to Inmarsat for the U.S. share of both aeronautical and maritime related capital requirements

and operational, depreciation and maintenance expenses. Comsat will acquire space segment capacity from Inmarsat and provide this capacity both to aeronautical customers using Comsat aeronautical earth stations and to U.S. service providers which may operate their own aeronautical earth stations and resell Inmarsat space segment capacity to aeronautical customers. We will require that Comsat's rates cover all investment and operational costs associated with aeronautical services and therefore not be subsidized by maritime services.[47] Finally, Comsat in its capacity as the U.S. Signatory, will submit appropriate applications to Inmarsat on behalf of its customers seeking to utilize space segment capacity for aeronautical services. In this respect, we emphasize that Comsat will not be the only service provider which may provide aeronautical earth station services. The Maritime Satellite Act and Commission policy already permits entities other than Comsat to operate coast earth stations with the Inmarsat system to provide maritime mobile satellite service.[48]

77. We conclude that our objective of promoting competition in the provision of Inmarsat aeronautical services can be achieved by requiring Comsat to provide both users and other service providers access to Inmarsat aeronautical space segment. First, Comsat's space segment services and rates will be subject to the competitive pressures of other Inmarsat Signatories. Additionally, the U.S. domestic mobile satellite system authorized to AMSC will have a certain range of effective coverage beyond U.S. borders and thus may be able to compete with Inmarsat for some international aeronautical mobile satellite traffic. Second, Comsat has stated that it will offer a multiplicity of space segment access and pricing arrangements intended to facilitate low-cost entry and competition among aeronautical service providers. In view of the lack of demonstrable cost benefits of competitive access, we believe that Comsat's proposal is the most useful of all proposed alternatives for promoting competition. Comsat states that it will offer (1) on-demand voice service by the minute and on-demand data service by the kilobit without an upfront customer expenditure or usage commitment; (2) monthly leased services of dedicated full-time channel equivalents (with flexible lease terms and prices reflecting a discount from the on-demand price); and (3) capitalized lease services that enable users of space segment to obtain an investment interest in dedicated facilities (the user would make a one-time up-front payment for a dedicated channel for the life of the satellite).[49] Comsat further states that aeronautical space segment capacity may be subdivided, resold, packaged and repackaged, and configured into either general purpose or customized aeronautical networks, as best meet user needs. While we make no findings here as to the appropriateness of tariffs not yet filed for these service offerings, from a policy standpoint we conclude that these types of offerings will likely result in increased competition by providing to aeronautical service providers several access arrangements at varied prices, terms and conditions.

78. Further, we note that these arrangements are different from the arrangements by which maritime satellite service is provided in the United States via Inmarsat. Under current arrangements for maritime service, Comsat supplies Inmarsat maritime space segment and optional aeronautical earth station services to users. U.S. domestic and international carriers are limited to providing customer access to the maritime satellite system by means of their existing onshore networks (usually interconnecting at a Comsat coast earth station).[50] However, the arrangements that we are adopting here for aeronautical services will enable other service providers to make full service offerings to their customers. As full-service providers, they would obtain the space segment portion of the service from Comsat and may operate their own coast earth stations as they wish. As a result, they will be able to fashion customized service offerings to meet the specialized needs of their customers. We will require Comsat, in its capacity of U.S. Signatory, to seek from Inmarsat whatever space segment access arrangements that U.S. service providers reasonably need to satisfy their customers' service requirements.[51]

79. Further, we believe that our objective of achieving timely and effective U.S. entry into the aeronautical market is best achieved by requiring U.S. access to Inmarsat aeronautical space segment through the U.S. Signatory, Comsat. This approach is consistent with the existing Inmarsat structure and, as discussed below, implementable without need for amendment of the Inmarsat agreements or the Maritime Satellite Act. Also, it avoids the potentially time consuming and fractious process of creating a consortium. Further, this approach gives the United States a single, strong voice within Inmarsat through which U.S. policy can be focused. We believe this to be an important consideration since Signatories will be competing with each other for aeronautical customers. Finally, the State Department has expressed serious reservations about the efficacy of a consortium in terms of disrupting the effectiveness of U.S. foreign relations with other government parties to the Inmarsat Convention and the effectiveness of the U.S. government instructional process with the U.S. Signatory. We agree with State that U.S. industry use of the Inmarsat space segment through the established U.S. Signatory, Comsat, is the most feasible and appropriate means of expediting U.S. entry into the market.

80. We also recognize the concerns raised by several parties in their comments that independent service providers may not be accorded meaningful participation in development of U.S. positions taken in Inmarsat Council on aeronautical-related matters. The Inmarsat Council makes critical decisions regarding procurement, launch and operation of space segment, determination of space segment charges and development of services, approval of the annual budget and financial regulations, and determination of investment shares. In particular, the Council decides how Inmarsat space segment may be used for providing aeronautical service, e.g., the availability and terms of dedicated lease access to space segment. Thus, the interests of U.S. aeronautical service providers which seek to develop customized service offerings to meet customer needs will be in the hands of Comsat which serves as the U.S. representative on the Council.

81. Comsat is already subject to the government oversight process provided in the Maritime Satellite Act and implemented by the State Department, NTIA and the Commission.[52] However, under current procedures, Inmarsat Council documents which are pre-decisional in nature typically qualify for confidential treatment under the Freedom of Information Act (FOIA) and are therefore not publicly available.[53] Interested parties may initiate a formal FOIA request for these documents. Nevertheless, this process can be time consuming and we have recognized that Comsat is under no obligation to waive its rights to a claim of confidentiality under the statute.[54] As a result, we adopt, in principle, Comsat's proposal that

aeronautical-related Council documents be made available to U.S. providers of Inmarsat aeronautical service in a timely manner prior to Council meetings subject to entering appropriate non-disclosure agreements to preserve the confidential nature of the documents. We believe that this is a necessary and reasonable step to provide U.S. service providers an opportunity to participate in the Inmarsat decision-making process. Of course it would be incumbent upon Comsat not only to provide documents in a timely manner, but to alert and inform U.S. aeronautical service providers even before the availability of documents, about aeronautical-related issues that are to be considered by the Council and to engage in timely and meaningful discussions with them prior to the formulation of U.S. positions. Any disagreements between Comsat and other U.S. service providers will be subject to review through the established instructional process.[55]

82. The precise conditions and procedures by which Comsat must make relevant documents available to and coordinate with other U.S. aeronautical service providers should be developed by the three agencies involved in the instructional process. We take no position here as to whether an aeronautical industry advisory committee should be created to involve U.S. service providers in the Inmarsat decision-making process as proposed by both Comsat and the State Department in their comments.[56] NTIA and Arinc found fault with the advisory committee concept.[57] No other party commented on this issue. In view of the different positions taken by NTIA and State on this issue, and the oversight responsibilities given to those agencies under the Maritime Satellite Act, we conclude that any decision to create an advisory committee should be taken jointly by all agencies with oversight responsibilities under the Act.

83. Finally, on issue of how Comsat should be structured to provide both aeronautical and maritime services, we note that our NPRM did not propose that Comsat be required to establish a separate aeronautical subsidiary to provide Inmarsat aeronautical services. The NPRM instead relied upon separate accounting for maritime and aeronautical services to protect against cross- subsidization. After reviewing the comments addressing this issue, we continue to believe that requiring Comsat to establish a separate aeronautical subsidiary is unnecessary since appropriate accounting arrangements can prevent maritime/aeronautical cross-subsidization. For the same reasons, we believe that a separate Comsat subsidiary is not required to provide aeronautical space segment services as distinguished from aeronautical earth segment services. Again, accounting methods should be sufficient. Comsat shall continue to isolate the capital and expense costs of the aeronautical portion of its Inmarsat activities and to separate the aeronautical accounts from accounts used to compute rates to maritime users. Also, Comsat shall within 90 days from the release of this order to file a complete description of the accounting system and cost allocation procedure used to develop its unbundled aeronautical space and earth segment service offerings. This information should be filed concurrent with its tariffs.[58]

84. We find premature NTIA's suggestion that the Commission should initiate an inquiry to determine whether to deregulate the rates Comsat may charge for aeronautical space segment services. NTIA avers that under competitive provision of space segment services, or the threat thereof, the Commission may be in a position to free Comsat from the rate regulation for its aeronautical (space segment) offerings it now faces for its other jurisdictional activities. However, we would prefer to wait until we have sufficient experience with the mechanism that we have established herein before we move to the issue of what options of deregulation would be feasible.

85. Finally, we do not adopt NTIA's proposal that we limit our decision at this time to the issue of Comsat's entry into the market, and defer decision on the issue of the entry of other applicants through a competitive access or similar mechanism. The record before us is sufficient to reach a conclusion on the issue of competitive access. We therefore see no reason to hold this issue in abeyance. Moreover, we believe that it would be inadvisable to leave the competitive access issue unresolved. Failure to resolve this issue would leave a cloud over Comsat's status as the U.S. entity within Inmarsat that speaks for the United States on aeronautical issues. We believe that this would be inconsistent with our objective of achieving timely and effective U.S. entry into the market.

86. *Legal basis for Comsat's provision of Inmarsat aeronautical space segment capacity.* In our *January 1987 Order* denying Comsat's application to participate in the Inmarsat aeronautical program, we concluded on the record then before us that the Maritime Satellite Act bars Comsat, in its role as U.S. Signatory, from being the sole provider of Inmarsat aeronautical services absent congressional action. However, upon consideration of additional information provided by Comsat in this proceeding and the comments of other parties, we conclude that the Act does permit Comsat to be the U.S. provider of Inmarsat aeronautical space segment capacity as ancillary to its role as U.S. Signatory and sole operating entity in the provision of Inmarsat maritime services. Specifically, we find that Comsat's provision of Inmarsat aeronautical services will be ancillary to and supportive of its provision of maritime services and therefore permissable under the Maritime Satellite Act. The key distinction between our decision in this proceeding and our *January 1987 Order* is that the record in this proceeding demonstrates that Comsat's provision of aeronautical services would be ancillary to and supportive of its provision of maritime services. As a result, we find that authorizing Comsat to provide Inmarsat aeronautical service as the U.S. Signatory and operating entity would be consistent with the authority granted to Comsat by the Maritime Satellite Act.

87. Congress enacted the Maritime Satellite Act to provide for "the establishment, ownership, operation, and governmental oversight and regulation of international maritime satellite telecommunications services."[59] Section 502(a) of the Maritime Satellite Act provides for U.S. participation in Inmarsat "in order to develop and operate a global maritime satellite telecommunications system." 47 U.S.C. § 751(a). Such system shall "have facilities and services which will serve maritime commercial and safety needs of the United States and foreign countries." *Id.* Section 503(a)(1) designates Comsat "as the sole operating entity of the United States for participation in Inmarsat, for the purpose of providing international maritime satellite telecommunications services." 47 U.S.C. § 752(a)(1).

88. In our *January 1987 Order* denying Comsat's application to participate in Inmarsat's aeronautical program, we concluded that the Maritime Satellite Act "confers a monopoly status on Comsat that is limited to the provision of maritime satellite services, and that the legislative history of the Act clearly shows that Congress intended Comsat's monopoly role in Inmarsat to be so

limited . ."[60] We further stated that "[i]n view of the fact that Comsat's monopoly in providing maritime services via Inmarsat was conferred on it by legislative action, we believe that its extension to these [aeronautical] services can only be granted by similar action."[61] We also noted that extending Comsat's monopoly role would require a broad public interest examination into what effect such action would have on a potentially competitive market and that "Congress should conduct this review."[62]

89. In its comments in this proceeding, Comsat contends that the Commission can authorize it to engage in and provide Inmarsat aeronautical services in its role as the U.S. Signatory and operating entity in Inmarsat. First, Comsat maintains that the Maritime Satellite Act authorizes it to provide aeronautical as well as maritime services via Inmarsat. Comsat argues that the Maritime Satellite Act does not limit Comsat's role to the provision of maritime services. While portions of the Act do refer to the provision of "international maritime satellite telecommunications services," Comsat points out that there is not a single provision in the Act which states that Comsat is limited to or may only provide maritime services, just as there is not a single provision in the Act which prohibits Comsat from aeronautical activities. On the contrary, Comsat contends the Congressional declaration of policy and purpose states, without qualification, that "[i]t is the purpose of this [Act] to provide that the participation of the United States in Inmarsat shall be through the Communications Satellite Corporation." Comsat concludes that Congress named it as the U.S. Signatory to Inmarsat, and Comsat --and only Comsat -- is authorized to act as Signatory with respect to any activities in which Inmarsat lawfully engages.[63]

90. Second, Comsat argues that, even under the Commission's previous finding that the Maritime Satellite Act is only applicable to maritime services, the Commission may authorize Comsat to provide aeronautical services via Inmarsat as incidental and ancillary to maritime services. Comsat avers that precedents in corporate law relating to scope of corporate authority is fully applicable to powers granted to Comsat by statute - in this instance the Maritime Satellite Act. That body of law, Comsat argues, makes clear that Comsat's authority is not limited to activities expressly enumerated in that Act, but extends also to ancillary and incidental activities. Comsat maintains that the provision of Inmarsat aeronautical services will be ancillary or incidental to Inmarsat maritime services. It states that, while aeronautical services will be subsidiary to maritime services, the two services are closely interrelated from an operational standpoint and in terms of Comsat's Signatory role in Inmarsat. As a result, Comsat believes, that even under the most restrictive reading of the Act, Comsat's authorization extends beyond the strict provision of maritime satellite services to other activities that are ancillary or incidental to the provision of maritime services.

91. Arinc disagrees with Comsat's arguments that the Commission can authorize Comsat to engage in and provide Inmarsat aeronautical services. First, Arinc argues that the Maritime Satellite Act and its legislative history expressly restrict Comsat's sole source role as Inmarsat Signatory to the provision of maritime facilities and services. Further, even if the Act is found to be ambiguous on its face, Arinc argues that the Act's legislative history demonstrates conclusively that Congress intended to constrain Comsat's sole source role in Inmarsat to the provision of maritime facilities and services. Arinc therefore submits that Comsat lacks the statutory authority necessary to participate in the establishment or provision of Inmarsat aeronautical services on a monopoly basis. Second, Arinc contends that there is no merit to Comsat's argument that it may be authorized to provide Inmarsat aeronautical services as ancillary and incidental to maritime services. Arinc maintains that (1) the cases cited by Comsat are factually and legally distinguishable from the present situation and, in fact, underscore that Comsat is not legally competent to be a sole source provider of aeronautical services; (2) in cases where a corporation's actions conflict with statutory prohibition, the courts have uniformly held that the statute governs, and the corporate activity at issue is prohibited; (3) the Supreme Court has ruled that statutes creating monopolies or otherwise granting exclusive rights are to be strictly construed against the grantee of the statutory privilege; and (4) therefore it must be concluded that Comsat is prohibited from extending its status as sole source supplier of Inmarsat maritime services to the provision of aeronautical services, regardless of whether the services may be asserted to be ancillary or incidental.

92. It is clear that any authority Comsat may have to provide non-maritime services via Inmarsat as the U.S. Signatory and operating entity must be derived from the Maritime Satellite Act. The Act designates Comsat as the U.S. Signatory and the sole operating entity for maritime services. It does not expressly authorize Comsat to provide aeronautical or other non-maritime services; it is on its face silent as to Comsat's role in connection with any non-maritime services that Inmarsat may provide. We found in our *January 1987 Order* that the Act's legislative history contains language of limitation as to Comsat's role in the provision of Inmarsat services.[64] Based on this language, we concluded that Comsat's authorization under the Act was limited to maritime services. We continue to conclude that Comsat's express authorization is limited to maritime services. However, in arriving at our decision in the *January 1987 Order*, the record then before us was not sufficient to consider whether Comsat's provision of aeronautical services would be ancillary to the provision of maritime services. Although, Comsat presented an abbreviated version of the "ancillary service" argument in the application that we denied, the application did not contain sufficient information and data to support the argument. We find that the record in this proceeding contains information to demonstrate that Comsat's provision of aeronautical services will be ancillary to and supportive of its provision of maritime services. We therefore conclude that we can authorize Comsat's provision of aeronautical services in its role as U.S. Signatory and operating entity, notwithstanding the findings in our *January 1987 Order* regarding the legislative history of the Act.

93. While we are aware of no cases that address directly the question of ancillary authority of an entity such as Comsat, the case law regarding ancillary authority of corporations and government agencies is highly instructive and supports a determination that Comsat has ancillary authority to provide aeronautical services through Inmarsat. The U.S. Supreme Court has generally described the extent of corporate powers ancillary to those specifically granted by statute as: "[w]hatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless expressly prohibited, to be held, by judicial con-

struction, to be *ultra vires*." *Jacksonville, Mayport, Pablo Railway and Navigation Co. v. Hooper*, 160 U.S. 514, 525 (1986), (hereafter *Jacksonville)*. This principle has been followed in a number of cases where the court has refused to consider ancillary corporate activities as *ultra vires* to the corporation's charter.[65] Additionally, governmental agencies are also accorded jurisdiction "where reasonably" ancillary to the effective performance of [their] various responsibilities."[66] As discussed below, we believe that Comsat's provision of Inmarsat aeronautical services fits comfortably within the parameters established by these cases.

94. We disagree with Arinc's argument that the ancillary authority principle cannot be applied to Comsat. Arinc contends that the Supreme Court has ruled that statutes creating monopolies or otherwise granting exclusive rights are to be "strictly construed" against the grantee of the statutory privilege.[67] However, we believe that Arinc is misreading the law. The rule of strict construction applies only where a statute grants an advantage as against the general public, as distinguished from a right against some other party.[68] Clearly, while Comsat may be granted an advantage by the statute vis-a-vis other competitors, the Maritime Satellite Act does not grant Comsat an advantage against the public, but rather creates an advantage for the public. Where a public grant has as its purpose the promotion of great public enterprise and welfare, the basic policy behind the rule of strict interpretation is dissolved, and the courts are inclined towards a liberal policy to ensure the beneficent operation of the statute.[69]

95. Applying the ancillary authority principle to the matter before us, we must first determine whether the Maritime Satellite Act expressly prohibits Comsat from providing aeronautical services that are ancillary or incidental to its provision of maritime services via Inmarsat. If no express prohibition exists, we must determine whether there is a sufficient factual basis to demonstrate that Comsat's provision of aeronautical services would be ancillary to its provision of maritime services. To make this determination, we must consider whether Comsat's provision of Inmarsat aeronautical services is closely related to and important to protect or promote either its provision of maritime satellite services or its participation in Inmarsat decisions regarding maritime services.

96. Nothing in the Maritime Satellite Act expressly prohibits Comsat from providing services that are ancillary to its maritime services. The Act does not on its face prohibit Comsat from providing ancillary services. While the legislative history of that Act focuses Comsat's specific authorization on maritime services, it is inconclusive about ancillary services that support Comsat's provision of maritime services. It neither specifically addresses nor appears to comprehend the possibility of Comsat providing such ancillary services. Thus, while the legislative history indicates a general congressional intent that Comsat's authority be focused on the provision of maritime services, it does not follow that Congress intended to prohibit Comsat from engaging in activities that are supportive of its congressional mandate. We conclude that neither the Act nor its legislative history prohibits us from applying *Jacksonville* to Comsat's provision of Inmarsat aeronautical services.

97. We further conclude that the record in this proceeding supports a conclusion that Comsat's provision of aeronautical services would be ancillary to and supportive of its provision of maritime services. The critical factors supporting this conclusion are: (1) aeronautical services will be subsidiary to maritime services which will remain Inmarsat's primary mission; (2) aeronautical and maritime services will be provided over common space satellite resources and ground facilities and will use both common and contiguous spectrum; and (3) the resulting integrated operation of aeronautical and maritime services will not permit Inmarsat Council decisions regarding the planning and use of space segment to be separated in terms of aeronautical and maritime services.

98. As to the first factor, Inmarsat aeronautical services will be considered subsidiary to maritime services in terms of the basic purpose and function of the organization. The Inmarsat Convention makes it clear that the primary focus of the organization shall continue to be the provision of maritime services. Inmarsat's provision of aeronautical services may not adversely affect maritime services. The Convention, as amended, provides:

> The purpose of the Organization is to make provision for the space segment necessary for improving maritime communications and, as practicable aeronautical communications . . . ."[70]

Thus, from the standpoint of institutional obligations, Comsat's provision of Inmarsat aeronautical services as the U.S. Signatory would not require it to undertake obligations inconsistent with the stated purpose of the Maritime Satellite Act - to provide for U.S. participation in Inmarsat ". . . in order to develop and operate a global maritime satellite telecommunications system" that will " . . . have facilities and services which will serve maritime commercial and safety needs of the United States and foreign countries." 47 U.S.C. 751(a).

99. As to the second factor, there will be a close operational relationship between aeronautical and maritime services. Inmarsat is not planning to procure separate, dedicated spacecraft for aeronautical services nor is it requiring its members to build separate, dedicated aeronautical earth stations to handle Inmarsat aeronautical traffic. Rather, as Comsat points out, both services will be provided using the same spacecraft[71] and potentially common earth stations.[72] Each service will be provided over common and contiguous L-band spectrum using technologically similar terminal equipment. Aeronautical services offered over Inmarsat's first generation satellites will use maritime frequencies without any incremental space segment costs.[73] The incremental cost of adding aeronautical capability of 3 MHz of bandwidth to second generation satellites designed previously for maritime use is only $3.6 million out of the total outlay of $275 million.[74] In addition, Comsat indicates that the cost of modifying its two existing maritime coast earth stations to provide aeronautical services will be $410,000 for its proposed interim aeronautical service offering and $9.4 million for its eventual full service offering.[75] We believe that Comsat's provision of aeronautical services under these circumstances will be supportive of its maritime role. The integrated operation of maritime and aeronautical services should permit Comsat to provide maritime services more efficiently and cost-effectively by distributing common capital costs and expenses across a multi-service rather than a single service base. The spreading of common costs over additional services provides the potential for lower mari-

time rates. In addition, given the relatively small incremental costs associated with aeronautical services, the development of an aeronautical customer base would help Comsat keep its maritime prices low enough to prevent its maritime customers from migrating to other Signatories that can offer lower rates because of their ability to provide both aeronautical and maritime services. In view of these factors, there is no basis to conclude that Comsat's provision of aeronautical services either would raise rates for maritime services or in any way threaten the availability or degrade the quality of maritime services.

100. As to the third factor, decisions concerning the planning and use of space segment are made by the Inmarsat Council. As the U.S. Signatory, Comsat is the U.S. representative on the Council and participates in these decisions. In view of the integrated operation of the Inmarsat system in providing aeronautical and maritime services, it is clear that these decisions cannot be separated and addressed solely from the perspective or maritime communications or aeronautical communications.[76] Most Council decisions concerning the planning and use of space segment will involve both aeronautical and maritime considerations. These decisions will concern such matters as satellite system design, system planning, technical characteristics, spacecraft procurement, sparing philosophy, launch considerations, network management, etc. We believe that Comsat's participation as the U.S. Signatory in these decisions of this nature is necessary not only for it to represent effectively the United States on the Inmarsat Council with regard to maritime matters, but also to carry out its responsibilities under the Maritime Satellite Act to assure that Inmarsat maritime services satisfy U.S. commercial and safety needs. We believe that Comsat's ability to serve effectively as U.S Signatory for maritime issues could be adversely affected if it does not also serve as the U.S. Signatory for aeronautical issues. As the U.S. Signatory for maritime issues, Comsat has the largest ownership share (28 percent) and voting strength on the Council. However, the basis for calculating this percentage will include both maritime and aeronautical usage once Inmarsat begins providing aeronautical service. Comsat's overall ownership share and voting strength on the Council may thus decline if it is not authorized to serve as the U.S. Signatory and operating entity for aeronautical services.

101. In view of these factors, we conclude that, from an operational standpoint, Comsat's provision of Inmarsat aeronautical services clearly would be ancillary to and supportive of its provision of maritime services. We further conclude that Comsat's participation in Inmarsat as the U.S. Signatory both for aeronautical and maritime services would facilitate its ability to effectively represent the United States in Inmarsat with regard to maritime services. Because of the ancillary nature of aeronautical services, Comsat's authority to provide these services flows from the Maritime Satellite Act even though the Act does not expressly authorize Comsat to provide such services. We therefore conclude that Comsat's provision of Inmarsat aeronautical services is permissible under the Maritime Satellite Act subject to the conditions described above.

102. Finally, to the extent that our findings in this proceeding regarding the scope of Comsat's authority under the Maritime Satellite Act depart from our *January 1987 Order*, such outcome is well within the bounds of agency discretion established by law.[77] Under the circumstances at hand, we find that Congress has not stated a clear intent as to services ancillary to maritime; the statute itself is silent on such services and the legislative history is inconclusive. Given the fact that "Congress has not addressed the precise question at issue," the matter is left for this Commission to fill with "legislative regulations."[78] We believe that we have adopted a policy in this Report and Order that is based on a reasonable interpretation of the Maritime Satellite Act as well as U.S. obligations under the Inmarsat agreements.

CONCLUSION

103. We conclude that the public interest requires that Inmarsat international aeronautical mobile satellite services be made available to users in the United States. We find that Inmarsat aeronautical services are best suited for aircraft that are in international flight as discussed above. We further find that the form of U.S. participation in Inmarsat aeronautical services should not be through the competitive access/consortium mechanism that we proposed in the NPRM in this proceeding. We conclude that it would not be in the public interest to adopt at this time a policy which provides direct investment in Inmarsat space segment capacity through a consortium of U.S. authorized aeronautical service providers. We reach this conclusion for several reasons. First, public interest benefits of the NPRM competitive access/consortium proposal have not been clearly demonstrated by the record in this proceeding. Whatever theoretical benefits that may result from this approach are outweighed by the problems associated with it. Second, the complexities associated with creation of a consortium to implement competitive access would require extensive U.S. government oversight to ensure fulfillment of U.S. obligations under the Inmarsat agreements. The lack of support for the dual signatory aspect of the NPRM proposal would further complicate implementation of competitive access in a manner consistent with U.S. obligations. Absent giving signatory status to the consortium, a convoluted mechanism would have to be established to indirectly pass through Comsat as the U.S. Signatory the aeronautical-related capital costs and expense incurred by consortium members. Third, while the comments reflect support by several parties for a competitive access policy, there is no clear private sector commitment to participate in an aeronautical consortium. Fourth, we believe that U.S. policy should be designed to ensure timely and effective U.S. entry into the international aeronautical satellite communications market in response to foreign competitors both in service and equipment areas. We conclude that this goal may be impeded if the U.S. embarks on creation of a cumbersome competitive access/consortium arrangement that will take time to structure, delay U.S. entry into the world market, and unnecessarily inhibit U.S. competitive posture.

104. The record in this proceeding fails to demonstrate that a competitive access scheme is necessary to achieve meaningful competition in the provision of Inmarsat aeronautical services. We conclude instead that the best means of both promoting competition in the provision of Inmarsat aeronautical services and achieving timely and effective U.S. entry into the world market would be to permit Comsat to be the U.S. provider of Inmarsat space segment capacity as ancillary to its role as U.S. Signatory and operating entity for Inmarsat maritime services. This

approach is subject to the access conditions set forth herein and is fully consistent with the established institutional and operational requirements of the Inmarsat Convention and Operating Agreement. The U.S. will not have to seek any amendments to those documents or the Maritime Satellite Act. Neither will the Commission have to fashion and monitor complex arrangements between the U.S. Signatory and other U.S. aeronautical service providers in order to ensure fulfillment of U.S. obligations under the Inmarsat agreements. Further, as discussed above, we conclude that the Maritime Satellite Act does not bar us from adopting such a policy and authorizing Comsat to provide ancillary aeronautical space segment services as the U.S. operating entity in Inmarsat. We find that Comsat's provision of Inmarsat aeronautical services will be ancillary to and supportive of its provision of maritime services and therefore permissible under the Maritime Satellite Act.

105. We have analyzed the proposal contained in this notice with respect to the Paperwork Reduction Act of 1980, 20 U.S.C. §§1221-1223, and find that it imposes no new or modified information collection requirement on the public.

106. We certify, pursuant to section 604 of the Regulatory Flexibility Act of 1980, 5 U.S.C. §604, that the actions taken in this proceeding will not have a significant economic impact on a substantial number of small businesses. We conclude that the policies established for access to Inmarsat aeronautical space segment allow expanded aeronautical services to end users and provide smaller businesses with an opportunity to participate in the aeronautical satellite industry. To ensure that the public is provided with access to these services in a timely manner, it is important that the entities which are authorized to serve end users are financially able to proceed with service. We are aware that it is unlikely that a small business would have access to the large amounts of financing necessary for separate satellite licenses and would likely be found unqualified for such licenses under traditional financial qualification requirements. However, by obtaining expanded access through leases of Inmarsat capacity, small businesses will be able to participate in the less costly ground and aircraft segments of the system providing services to end users. The policies adopted here, therefore, permit Inmarsat's aeronautical space segment to be made available expeditiously to end users. In accordance with the provisions of the Regulatory Flexibility Act, the Secretary of the Commission shall mail a copy of this decision to the Chief for Advocacy of the Small Business Administration.

107. Accordingly, IT IS ORDERED that aeronautical services via the International Maritime Satellite Organization to aircraft in international flight shall be provided in the United States through the policy set out in this decision. This action is conditioned upon entry into force of the amendments to the Inmarsat Agreement and Operating Agreement permitting Inmarsat to provide aeronautical services.[79] Additionally, this action is taken under provisions of the Communications Act of 1934, 47 U.S.C. §§151, 154, 201-205, 214, 218-220, 222, 301-303, 308, 310-314 and 403 (1986), section 504(c) of the International Maritime Satellite Act, 47 U.S.C. 753(c) (1978), section 553 of the Administrative Procedure Act, 5 U.S.C. §553, and section 1.412 of the Commission's rules, 47 CFR §1.412 (1986).

108. IT IS FURTHER ORDERED that ARINC's Motion for Acceptance of Further Comments IS GRANTED.

109. IT IS FURTHER ORDERED that Comsat shall file such new applications or amendments to pending applications and tariffs (including a complete description of its accounting system and cost allocation procedures) with the Commission necessary to implement this decision.

110. IT IS FURTHER ORDERED that the Commission's *Memorandum Opinion and Order*, FCC 87-22, 2 FCC Rcd 390 (1987), IS VACATED.

111. IT IS FURTHER ORDERED that the Secretary of the Commission shall cause a summary of this Report and Order to be published in the Federal Register.

112. IT IS FURTHER ORDERED that CC Docket No. 87-75 is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Provision of Aeronautical Services via the Inmarsat System, CC Docket No. 87-75, Notice of Proposed Rule Making (NPRM), 2 FCC Rcd 1976 (1987).

[2] The MSS Commenters are: Global Land Mobile Satellite, Inc.; Hughes Communications Mobile Satellite Services, Inc.; MCCA American Satellite Service Corporation; McCaw Space Technologies, Inc.; Mobile Satellite Corporation; Omninet Corporation; Skylink Corporation; and Transit Communications, Inc.

[3] International Relay, Inc. (IRI) filed a "response" to reserve the right to file a pleading in response to comments of other parties. It did not submit reply comments.

[4] Letter from Counsel for Aeronautical Radio, Inc. and Counsel for Communications Satellite Corporation, to William J. Tricarico, Secretary, Federal Communications Commission (November 19, 1987); Letter from Counsel for Arinc and Counsel for Comsat to Chief, Common Carrier Bureau (May 9, 1988).

[5] Public Notice, DA 88-1767 (released November 10, 1988).

[6] Honeywell Commercial Flight Systems Group filed comments which were subsequently withdrawn.

[7] Arinc filed an unopposed Motion for Acceptance of Further Comments which we grant herein.

[8] Convention of the International Maritime Satellite Organization and Operating Agreement of the International Maritime Satellite Organization, Sept. 3, 1976, 31 U.S.T. 1 (entered into force July 16, 1979). Inmarsat was conceived after an extended process of international study and negotiation by representatives from 40 nations. In 1975, the Intergovernmental Maritime Consultative Organization (now the International Maritime Organization) convened a conference to consider establishing an international maritime satellite organization. In 1976, the conference opened for signature a convention and an operating agreement. Inmarsat was created when both agreements entered into force.

[9] The dual agreement concept was adopted at the insistence of the United States because of longstanding U.S. policy to utilize commercial telecommunications facilities to the maximum ex-

tent feasible. The U.S. insisted that the Inmarsat arrangements permit a member government to designate a private commercial entity which could assume financial, technical and operational responsibility on behalf of that government without government financial guarantees to Inmarsat.

[10] More recently, Inmarsat adopted at its Sixth Extraordinary Assembly of Parties meeting held January 17-19, 1989, amendments to its Convention and Operating Agreement to allow it also to provide land mobile satellite services. The formal process is now underway for acceptance of these amendments by Inmarsat parties.

[11] Inmarsat Second Generation Procurement, FCC 86-666 (released January 7, 1986), *recon. denied*, 104 FCC 2d 672 (1986), *appeal pending sub nom*, Aeronautical Radio, Inc. v. FCC, Case No. 86-1382 (D.C. Cir.), filed June 6, 1986.

[12] Communications Satellite Corporation, 2 FCC Rcd 390 (1987) (January 1987 Order), *appeal docketed*, No. 87-1077/78 (D.C. Cir. February 12, 1987), remanded by Order of the Court on November 22, 1988 in response to the November 15, 1988 Commission request.

[13] The Inmarsat Convention requires each member country to designate one Signatory which is responsible for all financial obligations under the Convention and Operating Agreement, including contributions to the capital requirements and operational expenses of Inmarsat. Signatory contributions are made in part through payment of space segment utilization charges. The Signatory has a voting interest on the Inmarsat Council in proportion to its investment share in Inmarsat. Investment shares are periodically redetermined in accordance with the Operating Agreement on the basis of utilization of space segment. In addition, the Signatory submits applications to Inmarsat seeking permission to utilize space segment capacity and to establish coast stations that access the Inmarsat system. Also, the Signatory represents its member nation on the Inmarsat Council. The Council is responsible for making critical decisions on commercial matters including the procurement of launch services, adoption of criteria and procedures for procurement and approval of procurement contracts, approval of the annual budget and other financial matters, and determination of space segment charges, investment shares and capital ceiling.

[14] Under the proposed interim arrangement, Comsat's functions would include: signing the Operating Agreement; collecting from consortium members and passing on to Inmarsat capital requirements and space segment utilization charges; applying for access to space segment on behalf of consortium members; and representing the U.S. on the Inmarsat Council on aeronautical matters.

[15] Communications Satellite Corporation, FCC 89-84 (released March 14, 1989).

[16] Public Notice, File Nos. CSG-89-058-ML and CSG-89-059-ML, Report No. I-6310 (released March 17, 1989); Public Notice, File No. I-T-C-89-076, Report No. I-6309 (released March 17, 1989). Comsat has filed a Section 214 application to provide demand assigned aeronautical satellite service via Inmarsat between Comsat's Southbury, Connecticut and Santa Paula, California coast earth stations, respectively, and aircraft in international flight. Comsat has also filed Title III applications to modify its coast earth stations to provide this service. Arinc has filed petitions to deny Comsat's applications.

[17] Public Notice, File Nos. CSG-89-076-P/L and CSG-89-077-P/L, Report No. I-6326 (released April 26, 1989); Public Notice, File No. I-S-P-89- 004, Report No. I-6325 (released April 26, 1989). Arinc has filed an application for authority to secure competitive access to Inmarsat aeronautical satellite facilities and services and Title III applications to construct and operate coast earth stations in Annapolis, Maryland and Niles, California to provide aeronautical mobile satellite services via Inmarsat. The applications are currently on public notice.

[18] NTIA suggests instead that the U.S. require Comsat to make arrangements with Inmarsat to ensure that members of the aeronautical consortium are able to participate fully in Inmarsat aeronautical activities as members of a single U.S. Signatory. NTIA would allow members to participate in all meetings of the Inmarsat organs and to gain access to Inmarsat aeronautical satellite facilities.

[19] NTIA takes issue with Comsat's alternative proposal. It contends that Comsat proposes only to extend its monopoly control to U.S. access to Inmarsat facilities and services and such control would not be in the public interest. NTIA states that any use of Inmarsat aeronautical facilities by Comsat should be on an equal basis with usage by other authorized entities; otherwise Comsat would have an undue advantage over other prospective providers. It points out that Comsat's proposed services are contingent on obtaining Inmarsat Council approval and that U.S. entities would be dependent on Comsat to negotiate on their behalf with Inmarsat for custom service arrangements. Since there would be no competitive checks to guard against cross-subsidization, or to ensure that Comsat's prices were related to cost, NTIA believes that Comsat's proposal relies too heavily on the Commission's exercise of regulatory control rather than on competitive pressures.

[20] Arinc first presented its AVCO proposal in its initial comments filed in this proceeding. However, in a letter submitted jointly with Comsat on November 19, 1987, Arinc indicated that it planned to obtain Inmarsat aeronautical satellite facilities from Comsat and did not seek to participate in a consortium of U.S. providers/users of Inmarsat aeronautical space segment or to otherwise invest in the Inmarsat system. Arinc stated at that time that the consortium concept proposed in our NPRM was ill-advised and should not be implemented. In place of the NPRM proposal, Arinc stated that new tariff arrangements proposed by Comsat should meet industry's needs and should therefore be given an opportunity to work in the evolving regulatory environment. Arinc further stated that the U.S. requires a single, strong Inmarsat Signatory to continue to provide effective U.S. leadership, to ensure a prompt U.S. aeronautical entry and to help U.S. industry meet foreign competition. Arinc argued that Comsat should be this Signatory. Arinc re-introduced its AVCO proposal, however, in its comments filed in response to Comsat's October 28, 1988, request for immediate resolution of this proceeding.

[21] GTE expresses concern about the lack of formal applications and public notice for Commission grants of special temporary authorizations (STAs) permitting the use of Inmarsat in the U.S. for certain mobile services. However, the limited, special nature of these requests does not warrant such requirements. The temporary authorizations that we have granted permit temporary, limited use by Comsat of transportable "land-based ship earth stations" to access Inmarsat space segment to meet certain satellite communications needs during the aftermath of natural or human disasters such as earthquakes, volcano eruptions and forest fires, and where these stations are the only adequate means of meeting urgent communications requirements.

[22] MSS Licensing Order, FCC 89-183 (adopted May 31, 1989).

[23] We will not, however, preclude Inmarsat from providing capacity on an interim basis to the U.S. domestic MSS licensee so that it may develop early service offerings pending construction and launch of its own dedicated domestic satellite system.

[24] Spectrum Allocation Order, (Gen. Docket Nos. 84-1231, 84-1233 and 84-1234) 61 RR 2d 165 (1986), *on recon* 2 FCC Rcd (1987).

[25] MSS Licensing Policies, 2 FCC Rcd 485 (1987).

[26] We recognize that the Inmarsat Convention does not limit use of the Inmarsat system to only communications that are international in character. However, members of Inmarsat are free to establish national policies defining how the Inmarsat system may be used within their respective jurisdiction. In the United States, we have generally authorized the use of Inmarsat facilities for communications that are international in character except in instances where use of Inmarsat for domestic communications fulfilled specific needs. For example, we have authorized on a temporary limited basis the use of transportable "land-based ship earth stations" to access Inmarsat space segment to meet certain satellite communications needs during the aftermath of natural or human disasters such as earthquakes, volcano eruptions and forest fires, and where these stations are the only adequate means of meeting urgent communications requirements. *See* footnote 21 *supra*.

[27] This policy is consistent with the intentions of at least one potential provider of aeronautical services via Inmarsat. *See* Letter dated November 29, 1988, from Vice President, Communications Satellite Corporation to the Commission. In addition, we believe that this policy will satisfy the request of AMSC that we take no action that would interfere with ongoing negotiations between AMSC and Comsat with respect to the lease of Inmarsat space segment for interim domestic mobile satellite services. Further, this policy is consistent with Article 8 of the Inmarsat Convention (as amended) which provides only for consultation of the maritime services of separate systems and not of the aeronautical or land mobile services.

[28] As to the first two categories, certain international flights may have more than one point of entry into the United States or more than one point of departure from the United States. Aircraft enroute between two U.S. domestic points as part of an international flight may use only the domestic mobile satellite system for satellite communications to the extent the coverage area of that system permits.

[29] AMSC is expected to provide AMSS(R) services within the United States and it is expected to incorporate into its overall system design reasonable and necessary technical requirements and system specifications for AMSS(R). Further, AMSC is expected to observe appropriate arrangements for handing-off AMSS(R) traffic between its system and others, such as Inmarsat's and Canada's, to insure that the integrity of AMSS(R) communications will be maintained internationally and domestically. However, in the event that the AMSC's combined MSS-AMSS(R) system does not meet reasonable and necessary technical requirements and system specifications for AMSS(R), use of a separate AMSS(R) system could be justified for domestic AMSS(R) communications. *See* MSS Licensing Order, FCC 89-183 (adopted May 31, 1989).

[30] *See* MSS Licensing Order, FCC 89-183 (adopted May 31, 1989).

[31] Canada will be establishing its own domestic mobile satellite system. Consequently, we would expect that aircraft flying into Canadian airspace would comply with the communications requirements specified by Canada for the use of its system.

[32] We are concerned that aeronautical mobile satellite services be developed in a manner that satisfies the safety requirements of the airlines. We understand that the FAA through the Radio Technical Commission for Aeronautics (RTCA) and the ICAO are developing standards for the provision of aeronautical mobile satellite services by different satellite providers to maintain the integrity and reliability of AMSS(R) communications. Accordingly, we will monitor this and other developments and make any policy adjustments that may be necessary. We will rely on the appropriate U.S. government agencies to make recommendations in this area.

[33] Inmarsat capital requirements include all direct and indirect costs for design, development, acquisition, construction and establishment of Inmarsat space segment, for acquisition of contractual rights by means of lease, and for acquisition of other property by Inmarsat. Financial requirements also include funds required for operation and maintenance and for administrative costs of the organization.

[34] Further, under the competitive access/consortium approach, consortium members would have to pay their share of Comsat's expenses associated with its Signatory responsibilities.

[35] As members of a consortium under a competitive access scheme, it is possible that independent U.S. service providers may be regarded by Inmarsat member nations as having a status greater than if they were Comsat's customers. However, it is problematical that any such perception would result in greater U.S. influence over Inmarsat service development.

[36] We reached similar conclusions in our decision rejecting a "direct access" policy for U.S. access to Intelsat space segment. *Direct Access*, 97 FCC 2d 296 (1984), *aff'd on appeal*, Western Union International v. FCC, 804 F. 2d 1280 (1986). In declining to pursue implementation of a direct access scheme for Intelsat space segment, we addressed alleged or perceived benefits of direct access: (1) that it might serve to prevent Comsat from including excessive costs in its bundled tariff and from loading R&D and administrative costs properly allocable to the earth station segment to the less competitive space segment; (2) that it would prevent Comsat from engaging in cross-subsidization; and (3) that it would enable the international record carriers (IRCs) to retain their leased-channel revenues and maintain their financial viability. We also identified the potential adverse consequences of implementing direct access. After weighing perceived benefits against clear drawbacks, we concluded that the direct access concepts before us were too vague and the proclaimed benefits too uncertain to warrant further consideration.

[37] For example, as noted before, there was virtually no support for the dual signatory model which is essential to implementing a workable competitive access approach. Without a second signatory for aeronautical matters, Comsat would be required to act as an agent for consortium members resulting in a far from optimum situation. *See* discussion in paragraph 65, *supra*.

[38] A suggestion has been made of giving the aeronautical investors a *pro rata* vote in Inmarsat, but such a mechanism is not possible given that the U.S. Signatory must cast its total voting share, representing both aeronautical and maritime investment, as a single bloc. Since it cannot split its vote, it is likely that the maritime ownership entity, Comsat, would dominate the aeronautical interests, at least in the immediate future.

[39] According to promotional information attached to Comsat's comments, SKYPHONE will provide a range of voice and data aeronautical communications, with potential for public and private networks, Arinc or SITA data. *See* Request of Communications Satellite Corporation for Immediate Resolution of Rule Making Proceeding and Related Matters, October 28, 1988, Attachment A.

[40] SITA, the International Society for Aeronautical Telecommunications, is a Paris-based international airline telecommunications cooperative with 324 members. SITA currently operates a telecommunications network for its members which provides telex and other data services.

[41] According to promotional information attached to Comsat's comments, the consortium intends to offer services beginning in 1990. This information states that the consortium established a cooperative framework " . . . to develop an integrated service offering based on a homogeneous, coordinated infrastructure." The three operators in the consortium " . . . will provide the Ground Earth Station (GES) facilities, necessary Access Control and Signalling (ACSE) equipment. These facilities will interface with the SITA Network, the Public Switched Telephone Network (PSTN), the Public Switched Data and Telex networks as well as direct leased lines to specific customers." In addition, "all four organisations will cooperate to ensure a homogeneous service to end users worldwide, by means of centralised coordination and administration facilities. SITA will develop and ensure the day-to-day operation of these centralised facilities on behalf of the four organisations. SITA will also be responsible for integration of the Satellite Data Services with the existing SITA VHF AIRCOM service and administer passenger billing by credit card companies on behalf of the airlines." *See* Request of Communications Satellite Corporation for Immediate Resolution of Rule Making Proceeding and Related Matters, October 28, 1988, Attachment A.

[42] *See* Communications Daily, November 17, 1988; *See also* Letter from Counsel for Arinc to Chief, Common Carrier Bureau, (File No. CSS-87-015(7)) dated January 24, 1989.

[43] Teleglobe Canada is constructing aeronautical earth station facilities in anticipation of providing aeronautical satellite links and connections to the public networks in the Western Hemisphere in connection with its cooperative arrangements with SITA.

[44] The FAA states that ADS will allow operators flying in oceanic areas to automatically and frequently communicate their aircraft position via satellite, thereby reducing the risk of aircraft collisions due to navigation errors.

[45] Arinc believed that there is time for the U.S. to develop a competitive access scheme because the Inmarsat aeronautical amendments had not yet entered into force. Also, Arinc stated that Inmarsat has not completed its policies on granting of lease capacity verses on-demand capacity; most commercial aircraft are not yet equipped with the necessary avionics; and earth station modifications necessary for providing a full range of aeronautical services will not be installed for at least two years. We disagree with Arinc. Foreign entities, such as SITA, can exploit uncertainties in the regulatory environment to lock up long term commitments from U.S. airlines. These commitments may be obtained even before all of the legal and facilities requirements have been fully achieved. Therefore, we strongly believe that the time frame necessary to work out all of the problems associated with a consortium would be such as to harm U.S. interests.

[46] *See* discussion in paragraph 79 below.

[47] *See* discussion in paragraph 83 below on a mechanism to guard against aeronautical/maritime cross-subsidization.

[48] *See* Section 503(f) of the International Maritime Satellite Telecommunications Act. 47 U.S.C. 752(f). *See also* International Maritime Satellite System, 91 FCC 2d 245 (1982).

[49] Any dedicated facilities would have to be approved by the Inmarsat Council. Of course this requirement would be the same under a competitive access arrangement.

[50] International Maritime Satellite System, 71 FCC 2d 1069 (1979).

[51] As the U.S. Signatory, Comsat already has been seeking space segment lease arrangements on behalf of potential U.S. service providers.

[52] Under this process, each agency individually monitors issues to be considered by the Inmarsat Council through review of Inmarsat documents and discussions with the U.S. Signatory (Comsat). Prior to a Council meeting, the agencies meet jointly with the Signatory to discuss matters on the Board's agenda, including options and strategies for the positions the United States will take at the meeting. If an issue on the Council's agenda is likely to affect U.S. interests or foreign policy, the three agencies consult with each other to arrive at a U.S. government consensus on the particular U.S. position required to satisfy that interest or policy requirement. This position is formulated into a set of specific written instructions given to Comsat prior to the Council meeting. Instructions normally are not given at meetings between the Signatory and government agencies. Rather, they are issued after discussion and achievement of a consensus by the three agencies. These instructions may be modified before or during the meeting, in writing or orally. Although some clarification of the instructions may be given to Comsat on an informal basis, the three agencies strive for full concurrence and agency clearance prior to making substantive modifications to any coordinated instructions.

[53] Not all relevant documents may be available for public inspection, since they may be subject to claims of confidentiality under the Freedom of Information Act. Over the past several years, the Commission has been presented with the issue of the public availability of Intelsat and Inmarsat documents. We have adopted a policy which broadens public access to Intelsat and Inmarsat information. In doing so, however, we recognized that some of these materials may merit confidential status. Commission rules permit any person submitting information to the Commission to request non-disclosure of such materials consistent with provisions of FOIA. In accordance with directives contained in the Comsat Structure Order, 90 FCC 2d 1159, 1191 (1982), procedures have been established with respect to the dissemination of Intelsat and Inmarsat documents. *See* Letter from Chief, Common Carrier Bureau to Counsel for Communications Satellite Corporation (March 30, 1984). Comsat is required to submit certain Intelsat and Inmarsat documents for inclusion in the Commission's routinely available files. Other documents are designated as qualifying for "threshold confidentiality." Such records are disclosed only upon a showing of good cause. Members of the public have the right to initiate a formal request for these latter documents.

[54] Communications Satellite Corporation, 3 FCC Rcd 7108 (1988).

[55] This form of review would still be necessary under a competitive access/consortium arrangement. For example, there could be disagreements within the consortium as to the formulation of U.S. positions on aeronautical issues, or there could be disagreements between Comsat and other members of the consortium on formulation of U.S. positions on matters that have both maritime and aeronautical implications. Either situation would require U.S. government intervention.

[56] The State Department proposes requiring Comsat, as U.S. Signatory, to act as agent for the advisory group. The group would have access to Comsat and Inmarsat aeronautical documents, and it could send an observer to Inmarsat meetings. The industry group would develop U.S. industry positions for the signatory to take to Inmarsat Council meetings. In the event

that the group could not reach a consensus, or when the industry position differed from the government position, the government instructional process would be determinative.

[57] NTIA contends that the advisory committee concept is not much different from the current mechanisms for industry participation in Inmarsat. It states that experience with these mechanisms does not establish a basis for extending them to new services; that the information provided by Comsat is usually "too sanitized to be genuinely helpful"; that Comsat's commercial interests are often in conflict with those of its U.S. competitors; and that the advisory committee concept proposal would not resolve this problem. NTIA contends that a policy structure must be established to allow participants to look after their own interests within Inmarsat. Arinc complains that: 1) the advisory committee would meet only with Comsat; 2) its members would be provided with Comsat-selected aeronautical documents; 3) the committee would only be included in the instructional process if consensus could not be reached; 4) and that the committee would never know whether or not Comsat presented that consensus to the U.S. government or whether Comsat's ultimate action was guided by its maritime or aeronautical interests.

[58] *See* Communications Satellite Corporation, 2 FCC Rcd at 395; *See also* letter to Vice President and General Manager, Comsat, from Chief, Common Carrier Bureau, dated August 16, 1986, and letter to Chief, Common Carrier Bureau from Comsat, dated August 27, 1987.

[59] H.R. Rep. No. 95-1134, Part I, 95th Cong., 2d Sess. 5 (1978) (hereinafter House Report). *See also* S. Rep. No. 95-1036, 95th Cong., 2d Sess. 1 (1978) (hereinafter Senate Report).

[60] Communications Satellite Corporation, 2 FCC Rcd at 394.

[61] *Id.*

[62] *Id.* at 395.

[63] Comsat also argues that State Department ratification of the Inmarsat aeronautical amendments supports its request for authorization as the sole U.S. operating entity for Inmarsat aeronautical services. Comsat states that the State Department action creates both a basis and an obligation for its participation in the Inmarsat aeronautical program, at least in terms of its Signatory functions. However, we conclude that the State Department's acceptance of the Inmarsat amendments is not determinative of the extent of Comsat's authority under the Maritime Satellite Act. It appears that the State Department based its authority to accept the amendments on behalf of the United States on the President's general foreign policy power. Letter from Assistant Secretary, Legislative and Intergovernmental Affairs, Department of State, to Chairman, Committee on Energy and Commerce House of Representatives, (1987). While the State Department concluded that the Maritime Satellite Act did not limit presidential authority to accept the Inmarsat aeronautical amendments, it does not follow as a matter of logic and law that the Act treats Comsat's authority in the same manner as presidential foreign policy authority. The key distinction is that the President has pre-existing power to enter into international agreements unless otherwise restricted by statute; Comsat's authority must come from the Maritime Satellite Act. Moreover, the State Department was careful to assert that its decision to accept the amendments did not affect any possible congressional action regarding provision of aeronautical services pursuant to the amendments within the United States. It stated that Congress or the Commission would " . . . remain free at any time, before or after United States acceptance of the proposed amendments, to construct a legislative or regulatory scheme for the provision of these services within the United States." *Id.* at 3.

[64] The Committee Reports cited in our *January 1987 Order* stated:

> This Committee does not intend that H.R. 11209 give Comsat a monopoly in an international satellite system. H.R. 11209 relates solely to maritime satellite telecommunications services and does not preclude the designation of some other entity for other international satellite systems that may be developed in the future. The Congress will have to look at these systems when they are proposed.

H.R. Rep. No. 95-1134, Part I, 95th Cong., 2d Sess. 10 (1978)

> By designating Comsat to represent the United States in providing international maritime satellite communications, the committee does not intend to authorize Comsat to provide other international communications services not contemplated by this bill. If other international telecommunications services become feasible in the future, the committee will examine the provision of those services on the information then available. Actions taken by the committee in this instance would not necessarily be a precedent for management of future international telecommunications systems.

S. Rep. No. 95-1036, 95th Cong., 2d Sess. 8 (1978)

[65] Union Pacific Railway Co. v. Chicago Railway Co., 163 U.S. 564, 581 (1896); Big Creek Gap Coal and Iron Co. v. American Loan and Trust Co., 127 F 625 (6th Cir. 1904); Farmer's Life Insurance Co. v. Foster, 272 F 864, 868 (5th Cir. 1921). We recognize that these cases involve facts that are not necessarily analogous to those here, but we believe that these cases nonetheless illustrate the relevant standard of interpretation for corporate charters or purposes authorized by statute. *See also*, Sutherland, *Statutory Construction*, 187 (4th ed. 1984) ("The principle that may be derived from a large majority of cases would seem to be that statutes affecting corporate rights, duties, privileges and powers should in all cases be given reasonable interpretation").

[66] U.S. v. Southwestern Cable Co., 392 U.S. 157, 177-178 (1968). *See also* Computer and Communications Industry v. FCC, 693 F 2d 198, 213 (D.C. Cir. 1982), *cert denied*, 461 U.S. 938 (1983).

[67] Piedmont Power and Light Co. v. Town of Graham, 243 U.S. 193, 194-195 (1920).

[68] Charles River Bridge v. Warren Bridge, 36 U.S. 420, 548 (1837).

[69] Poss v. Barland, 26 U.S. 655, 666 (1828); Silver v. Ladd, 74 U.S. 219 (1868); United States v. Certain Real Estate, 217 F.2d 920 (1954).

[70] Inmarsat Basic Documents, Convention, Art 3 (amended) at 13 (3d ed. 1986).

[71] Comsat states that both maritime and aeronautical services will use common repeaters on Inmarsat satellites for both outbound (land to mobile station) and inbound (mobile station to land) transmission.

[72] For the services that it proposes, Comsat states that the communications signals will be transmitted through the same coast earth stations -- in the United States, the Southbury, Connecticut and Santa Paula, California earth stations already providing maritime communications. According to Comsat, "the only new equipment needed in these earth stations is the

baseband communication and controller equipment, which will interface with the existing earth station equipment at an intermediate frequency so that the existing antennas, receivers, transmitters, frequency control equipment, etc. can be used."

[73] Section 2.106 (Table of Allocations) of the Commission's rules allocates to the Maritime Mobile-Satellite Service the frequencies used by first generation Inmarsat satellites. Therefore, in the United States, use of these frequencies for AMSS(R) must be provided for under other provisions of the Commission's rules or pursuant to waiver of the rules to carry out the policy goals of this decision.

[74] *See* Communications Satellite Corporation, 2 FCC Rcd at 391.

[75] *See* Comsat Application to Modify Inmarsat Coast Earth Stations for Aeronautical Satellite Service Capability (File Nos. CSG-89-058-P/L and CSG-89-059-P/L) December 14, 1989. Comsat seeks to offer a slow speed cockpit data services as early as the summer of 1989 as an interim service while equipment for its proposed full service is being developed and readied for operation. Comsat's proposes a full service offering that would include, by year-end 1990, cockpit data and cockpit voice demand assigned services to support airline operational and air traffic communications, and air passenger telephone service.

[76] For example, Comsat states that the technical specifications and spacecraft design must take into account both aeronautical and maritime services, and the selection of orbital locations for the satellites must consider the operational requirements of both aeronautical and maritime users. In particular, states Comsat, plans to establish a second Atlantic Ocean Region network and to close the existing gap in Pacific Ocean Region coverage reflect a balancing of maritime and aeronautical considerations.

[77] In light of our decision herein, we hereby vacate our *January 1987 Order*. One of the applications at issue in the *January 1987 Order* (File No. I-T-C-86-181) has already been dismissed by the Common Carrier Bureau at the request of Comsat. Letter from Chief, International Facilities Division to Warren Y. Zeger, Communications Satellite Corporation, dated May 3, 1989. Consistent with our decision here, the Common Carrier Bureau will act on the remaining application (CSS-86-005-M(2)) at a later date.

[78] In construing such express grants of authorization, the courts have accorded great deference to agency construction even where that construction has changed from time to time. Such construction is given controllong weight unless it is "arbitrary, capricious, or manifestly contrary to statute." *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984) and cases cited therein. *See also TRT Telecommunications Corporation* v. FCC, Case Nos. 88-1357 and 88-1358, Slip Op (D.C. Cir. May 23, 1989).

[79] We stated in our *January 12th Order* that we cannot authorize United States participation in Inmarsat aeronautical services unless and until the United States formally accepts the aeronautical amendments to the Inmarsat Convention and Operating Agreement and those amendments enter into force. Notwithstanding the second part of that statement, and in view of the potential for worldwide competition in this area that is developing and the fact that the amendments will shortly enter into force, we now believe that the public interest will best be served by establishing a policy as to how international aeronautical mobile satellite services via Inmarsat will be provided in the United States. As indicated above, those amendments will enter into force on October 13, 1989. Accordingly, we shall grant the Common Carrier Bureau delegated authority to act on applications by Comsat to provide international aeronautical mobile satellite services via Inmarsat in light of the formal entry into force of these amendments on that date.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS
CORPORATION,
Complainant,

v. File No. E-88-55

THE DIAMOND STATE
TELEPHONE COMPANY,
Defendant.

ORDER TO SHOW CAUSE

Adopted: July 26, 1989; Released: July 27, 1989

By the Deputy Chief, Common Carrier Bureau:

1. Pursuant to this Order, issued in the above-referenced formal complaint proceeding, we direct The Diamond State Telephone Company ("defendant") to show cause why it should not pay certain damages, to be determined in conformity with this Order, to MCI Telecommunications Corporation ("complainant").

I. BACKGROUND

2. The instant complaint was filed on February 9, 1988. Complainant alleges that defendant's rates for interstate access services for the period October 1, 1985, through December 31, 1986, were unjust and unreasonable in violation of Section 201(b) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 201(b). Complainant's allegations derive from its assertions that filings made with the Commission by the defendant for the 15 month period at issue establish that the defendant earned a return of 15.65 percent in the interstate special access service category which is in excess of the lawful rate of return prescribed by the Commission in CC Docket No. 84-800. *See Authorized Rates of Return for the Interstate Service of AT&T Communications and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, FCC 85-527.[1] Complaint, at 3. Complainant seeks damages in an amount equal to the difference between interstate access service rates it actually paid during the relevant time period and the amount it would have paid if the defendant's charges had earned within the zone of reasonableness established by the Commission in Phase I of its Docket No. 84-800 rate of return proceeding, plus accumulated interest. Complaint, at 4.

3. In its Consolidated Answer and Motion to Dismiss,[2] defendant denies that complainant has stated a valid cause of action pursuant to Sections 206-209 of the Act and states that complainant is not entitled to the relief sought. Answer, at 1-4. Complainant has opposed the Motion to Dismiss. We deny the Motion to Dismiss to the extent we conclude that complainant has established a *prima facie* case that defendant's tariffed interstate access rates produced revenues unlawfully in excess of the Commission's rate of return prescription and order the defendant to show cause why it should not pay damages. We defer ruling on all other issues raised in defendant's Motion to Dismiss.

II. DISCUSSION

4. Based on the record before us, we conclude that the complainant has made a *prima facie* case of a violation of the Communications Act for which damages may lie. Accordingly, the defendant is ordered to show cause why damages should not be remitted to the plaintiff in the amount of the difference between the rates it paid and those rates that would have secured for the defendant a level of earnings no greater than those authorized.

5. Under the Communications Act, the Commission regulates the rates carriers may charge for interstate telecommunications services. 47 U.S.C. §§ 201-205. As part of that process, the Commission sets the rate of return on capital that carriers use in connection with the recovery of that portion of their costs apportioned to the interstate jurisdiction.[3] The Commission also has prescribed for all local exchange carriers (LECs), including the defendant, a methodology commonly known as the "access charge system," which carriers are required to follow in tariffing interstate services. This methodology determines, *inter alia*, the carriers' rate structure and the allocation of costs within that structure.[4] For the time period at issue in the instant complaint, from October 1, 1985, through December 31, 1986, carriers were required to target their interstate access rates to earn a 12.75 percent return on their capital. Carriers also were notified by the Commission that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate access earnings during this period and 13.25 percent would be the maximum allowable rate of return on individual access service categories.[5]

6. The Act also provides that "any person" may petition the Commission in complaint of "anything done or omitted to be done" by a common carrier in contravention of the Act, that carriers shall be liable "for the full amount of damages sustained in consequence of any such violation," and that the Commission shall order the payment of damages in reparation of such violation(s). 47 U.S.C. §§ 206, 208-209.

7. The complainant alleges that it has been damaged because it has paid to the defendant charges for interstate access that yielded rates of return that exceeded the Commission's prescribed rate of return. In support of its complaint, the complainant points to a rate of return monitoring report filed with this Commission by defendant which shows that for the period October 1, 1985, through December 31, 1986, defendant earned a return of 15.65 percent in the special access category. Complainant states that because defendant's rate of return exceeded the rate prescribed by the Commission, defendant's charges for interstate access as set forth in its tariffs were unjust and unreasonable under Section 201(b) of the Act, that the complainant has been damaged by having to pay such rates, and that it is entitled to reparations.

8. The crux of defendant's argument in its Answer and Motion to Dismiss is that the instant complaint cannot lie given the ruling of the court striking down the automatic refund mechanism and given the fact that the defendant

did not earn in excess of the applicable rate of return on an overall basis. Answer, at 1-2. Defendant claims, in effect, that complainant's request for damages is nothing but a disguised request that the Commission order the automatic refund the court found unlawful.

9. Defendant's reliance on *AT&T v. FCC* in its Answer and Motion to Dismiss is unfounded. The Court in that case did not discuss Section 208 proceedings, nor did it purport to alter the statutory scheme of the Communications Act or limit the remedies Congress established therein. Moreover, the Court previously has recognized that the Commission has the power to prescribe an authorized rate of return. The defendant's own filing with the Commission shows that the rates at issue generated revenues for the defendant which exceed authorized rate of return levels for the relevant study period, in this case, the 15 month period established by the formal complaint and consistent with the reporting period established in Docket 84-800.[6] This is enough to make out a *prima facie* case of a Communication's Act violation and is sufficient support for a Section 208 complaint.

10. We cannot find in the defendant's Answer and Motion to Dismiss sufficient rationale to deny the complainant the relief it seeks. Although the current record arguably provides a legally adequate basis to support Commission action at this time,[7] we are providing the defendant an additional opportunity to show cause why the Commission should not order the payment of damages sought by the complainant. The defendant also is directed to provide a calculation of such damages for each service and/or service segment as alleged in the instant complaint within twenty days of the release of this Order.[8] Thereafter, complainant is afforded ten days within which to reply to defendant's showing.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that The Diamond State Telephone Company SHOW CAUSE within 20 days of the release date of this Order why it should not remit to complainant damages due and owing as specified in complainant's complaint and pursuant to the guidelines set out herein.

12. IT IS FURTHER ORDERED that MCI Telecommunications Corporation may file comments on the The Diamond State Telephone Company's submission no later than 10 days after the filing of that submission with the Commission.

13. This Order is issued pursuant to delegated authority under 47 C.F.R. Section 0.291 and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] Several parties sought judicial review of the portion of the Commission's decision in Docket 84-800 that ordered automatic refunds of carrier earnings in excess of the prescribed return. The D.C. Circuit Court of Appeals invalidated the Commission's decision in that regard. *See American Telephone and Telegraph Co. v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) (*"AT&T v. FCC"*), *cert. denied*, _____ U.S. _____ (1989). No party challenged the rate of return prescription itself, and that prescription remains valid.

[2] MCI filed similar complaints against a number of local exchange carriers. The defendant, along with Chesapeake & Potomac Telephone Company and New Jersey Bell Telephone Company, collectively filed a Consolidated Answer and Motion to Dismiss MCI's complaints against their respective companies. In the interest of clear and unambiguous disposition of these matters, we will treat the Consolidated Answer and Motion to Dismiss on an individual defendant basis in each complaint proceeding.

[3] *Nader v. FCC*, 520 F.2d 182, 203-04 (D.C. Cir. 1975).

[4] *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[5] *See* 47 C.F.R. § 65.701.

[6] We note that in *AT&T v. FCC*, the Court indicated that the Commission's automatic refund mechanism might have survived challenge if it had provided a means for taking into account the impact of a refund obligation on a carrier's overall rate of return. 836 F.2d at 1390 n.4. As noted previously, the holding and opinion in that case are not controlling here. If in response to this order to show cause, however, defendant elects to argue that the Commission should consider the impact on the defendant's overall return that would result from an award of damages in the instant proceeding, the defendant should include in its response a precise accounting of that impact.

[7] The Commission's Rules provide that formal complaints generally are resolved on a written record consisting of a complaint, answer, and reply. 47 C.F.R. § 1.720. The defendant has filed its answer and could not argue plausibly that judgment at this point in the proceeding violated its due process rights.

[8] For purposes of this calculation, defendant should assume a study area defined by the geographical reach of defendant's filed tariffs, a maximum allowable rate of return of 13.1 percent per overall interstate earnings, and a maximum allowable rate of return for any access service category of 13.25 percent. These assumptions are consistent with 47 C.F.R. § 65.701(b) and the Commission's Order in Phase I of Docket No. 84-800, *supra*. Calculations should be explained fully with evidentiary support adequate to allow the Bureau and complainant to evaluate defendant's arguments and support documentation. To the extent defendant wishes to re-submit materials previously submitted in its Answer, defendant is encouraged to do so as long as the relation of such materials to defendant's arguments is clearly set out. All pleadings and information submitted thus far, in addition to those submitted in response to this Order, will be duly considered in making a final determination in this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS
CORPORATION,
Complainant,

v. File No. E-88-54

NORTHWESTERN BELL
TELEPHONE COMPANY,
Defendant.

ORDER TO SHOW CAUSE

Adopted: July 26, 1989; Released: July 27, 1989

By the Deputy Chief, Common Carrier Bureau:

1. Pursuant to this Order, issued in the above-referenced formal complaint proceeding, we direct Northwestern Bell Telephone Company ("defendant") to show cause why it should not pay certain damages, to be determined in conformity with this Order, to MCI Telecommunications Corporation ("complainant").

I. BACKGROUND

2. The instant complaint was filed on February 9, 1988. Complainant alleges that defendant's rates for interstate access services for the period October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 201(b). Complainant's allegations derive from its assertions that filings made with the Commission by the defendant for the 15 month period at issue establish that the defendant earned returns in the interstate special and switched traffic sensitive access categories which are in excess of the lawful rate of return prescribed by the Commission in CC Docket No. 84-800. *See Authorized Rates of Return for the Interstate Service of AT&T Communications and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, FCC 85-527.[1] Complaint, at 3. Complainant seeks damages in an amount equal to the difference between interstate access service rates it actually paid during the relevant time period and the amount it would have paid if the defendant's charges had earned within the zone of reasonableness established by the Commission in Phase I of its Docket No. 84-800 rate of return proceeding, plus accumulated interest. Complaint, at 4.

3. In its Answer,[2] defendant denies that complainant has stated a valid cause of action pursuant to Sections 206-209 of the Act, alleges various procedural irregularities in connection with the complaint, disputes the propriety of Commission-ordered relief and claims that portions of the damages claim are, in any event, barred by the limitations provisions of 47 U.S.C. § 415. Answer, at 4-8. Additionally, defendant filed a Motion to Dismiss on March 31, 1988 which complainant has opposed. We deny the Motion to Dismiss to the extent we conclude that complainant has established a *prima facie* case that defendant's tariffed interstate access rates produced revenues unlawfully in excess of the Commission's rate of return prescription and order the defendant to show cause why it should not pay damages. We defer ruling on all other issues raised in defendant's Motion to Dismiss.

II. DISCUSSION

4. Based on the record before us, we conclude that the complainant has made a *prima facie* case of a violation of the Communications Act for which damages may lie. Accordingly, the defendant is ordered to show cause why damages should not be remitted to the plaintiff in the amount of the difference between the rates it paid and those rates that would have secured for the defendant a level of earnings no greater than those authorized.

5. Under the Communications Act, the Commission regulates the rates carriers may charge for interstate telecommunications services. 47 U.S.C. §§ 201-205. As part of that process, the Commission sets the rate of return on capital that carriers use in connection with the recovery of that portion of their costs apportioned to the interstate jurisdiction.[3] The Commission also has prescribed for all local exchange carriers (LECs), including the defendant, a methodology commonly known as the "access charge system," which carriers are required to follow in tariffing interstate services. This methodology determines, *inter alia*, the carriers' rate structure and the allocation of costs within that structure.[4] For the time period at issue in the instant complaint, from October 1, 1985, through December 31, 1986, carriers were required to target their interstate access rates to earn a 12.75 percent return on their capital. Carriers also were notified by the Commission that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate access earnings during this period and 13.25 percent would be the maximum allowable rate of return for any access service category.[5]

6. The Act also provides that "any person" may petition the Commission in complaint of "anything done or omitted to be done" by a common carrier in contravention of the Act, that carriers shall be liable "for the full amount of damages sustained in consequence of any such violation," and that the Commission shall order the payment of damages in reparation of such violation(s). 47 U.S.C. §§ 206, 208-209.

7. The complainant alleges that it has been damaged because it has paid to the defendant charges for interstate access that yielded rates of return that exceeded the Commission's prescribed rate of return. In support of its complaint, the complainant points to a rate of return monitoring report filed with this Commission by defendant which shows that for the period October 1, 1985 through December 31, 1986, defendant earned returns in the special access category of 14.31 percent in the state of Iowa, 13.85 percent in Minnesota, 13.63 percent in Nebraska and 16.01 percent in North Dakota. Complainant contends that the monitoring reports also show that defendant earned returns in the switched traffic sensitive category of 14.64 percent in Iowa, 14.33 percent in Minnesota, 15.79 percent in Nebraska and 19.71 percent in

North Dakota. Complainant states that because defendant's rates of return exceeded the rate prescribed by the Commission, defendant's charges for interstate access as set forth in its tariffs were unjust and unreasonable under Section 201(b) of the Act, that the complainant has been damaged by having to pay such rates and that it is entitled to reparations.

8. The crux of defendant's argument in both its Answer and Motion to Dismiss is that the instant complaint cannot lie given the ruling of the court striking down the automatic refund mechanism. Answer, at 6; Motion to Dismiss at 3-4. The defendant claims, in effect, that complainant's request for damages is nothing but a disguised request that the Commission order the automatic refund the court found unlawful.

9. Defendant's reliance on *AT&T v. FCC* in its Answer and in support of its Motion to Dismiss is unfounded. The Court in that case did not discuss Section 208 proceedings, nor did it purport to alter the statutory scheme of the Communications Act or limit the remedies Congress established therein. Moreover, the Court previously has recognized that the Commission has the power to prescribe an authorized rate of return. The defendant's own filing with the Commission shows that the rates at issue generated revenues for the defendant which exceed authorized rate of return levels for the relevant study period, in this case, the 15 month period established by the formal complaint and consistent with the reporting period established in Docket 84-800.[6] This is enough to make out a *prima facie* case of a Communication's Act violation and is sufficient support for a Section 208 complaint.

10. We cannot find in the defendant's answer or Motion to Dismiss sufficient rationale to deny the plaintiff the relief it seeks. Although the current record arguably provides a legally adequate basis to support Commission action at this time,[7] we are providing the defendant an additional opportunity to show cause why the Commission should not order the payment of damages sought by the complainant.[8] The defendant also is directed to provide a calculation of such damages for each service and/or service segment as alleged in the instant complaint within twenty days of the release of this Order.[9] Thereafter, complainant is afforded ten days within which to reply to defendant's showing.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that Northwestern Bell Telephone Company SHOW CAUSE within 20 days of the release date of this Order why it should not remit to complainant damages due and owing as specified in complainant's complaint and pursuant to the guidelines set out herein.

12. IT IS FURTHER ORDERED that MCI Telecommunications Corporation may file comments on the Northwestern Bell Telephone Company submission no later than 10 days after the filing of that submission with the Commission.

13. This Order is issued pursuant to delegated authority under 47 C.F.R. Section 0.291 and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] Several parties sought judicial review of the portion of the Commission's decision in Docket 84-800 that ordered automatic refunds of carrier earnings in excess of the prescribed return. The D.C. Circuit Court of Appeals invalidated the Commission's decision in that regard. *See American Telephone and Telegraph Co. v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) ("*AT&T v. FCC*"), *cert. denied*, _____ U.S. _____ (1989). No party challenged the rate of return prescription itself, and that prescription remains valid.

[2] MCI filed companion complaints against the three US West, Inc. companies including Pacific Northwest Bell, Mountain States Telephone and Telegraph Co. and Northwestern Bell Telephone Co. The defendants collectively filed a Joint Answer and Joint Motion to Dismiss MCI's complaints. In the interest of clear and unambiguous disposition of these matters, we will treat the Joint Answer and Joint Motion to Dismiss as a separate pleading in each complaint proceeding.

[3] *Nader v. FCC*, 520 F.2d 182, 203-04 (D.C. Cir. 1975).

[4] *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[5] *See* 47 C.F. R. Section 65.701.

[6] We note that in *AT&T v. FCC*, the Court indicated that the Commission's automatic refund mechanism might have survived challenge if it had provided a means for taking into account the impact of a refund obligation on a carrier's overall rate of return. 836 F.2d at 1390 n.4. As noted previously, the holding and opinion in that case are not controlling here. If in response to this order to show cause, however, defendant elects to argue that the Commission should consider the impact on the defendant's overall return that would result from an award of damages in the instant proceeding, the defendant should include in its response a precise accounting of that impact.

[7] The Commission's Rules provide that formal complaints generally are resolved on a written record consisting of a complaint, answer, and reply. 47 C.F.R. § 1.720. The defendant has filed its answer and could not argue plausibly that judgment at this point in the proceeding violated its due process rights.

[8] Defendant's contention that portions of complainant's damage claims are barred by Section 415 of the Act is unavailing. The purpose of Section 415 is "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed." Bunker Ramo Corp., 31 FCC 2d 449, 453 (1971). The statute is not discretionary and the lapse of time beyond the limitation period not only bars the remedy but also destroys the liability. Armstrong Utilities, Inc. v. General Telephone Co. of Pennsylvania, 25 FCC 2d 385 (1970); cf. Midstate Co. v. Pennsylvania R. Co., 320 U.S. 356, 363-64 (1943); Kansas City So. R. Co. v. Wolf, 201 U.S. 133 (1923). The construction of Section 415 by the Commission and the federal courts has been strict and exceptions to its application have been confined to narrow circumstances. *Id.*; *see* Thornwell Barnes Co. v. Illinois Bell, 1 FCC 2d 1247 (1967); Ward v. Northern Ohio Telephone Company, 251 F. Supp. 606,

aff'd, 381 F.2d 16 (6th Cir. 1967). In *Bunker Ramo, supra,* however, the Commission's Review Board identified two basic situations in which the strict application of the statute may be altered or affected:

> First, a statute of limitations does not begin to run until discovery of the right or wrong or of the facts on which such knowledge is chargeable in law. Secondly, the running of the period of limitations may be suspended or tolled by various causes; for example, although mere ignorance will generally not toll the statute, active fraudulent concealment by a defendant will generally do so. 31 FCC 2d at 454.

The Review Board stated that "a defendant should not be permitted to interpose the statutory time limit as a defense where his conduct is the primary reason for the tardiness of the plaintiff's action." *Id.* Thus, even though Section 415 is a substantive and jurisdictional statute of limitations, the period of limitations may nevertheless be tolled in limited circumstances. Consistent with these guidelines, we conclude that the discovery of the "right or wrong" in the instant case occurred within the meaning of Section 415 when defendant filed its rate of return monitoring reports. Those reports showed that defendant had earned excessive returns on certain interstate access service categories for the relevant period. Until such time, complainant had no way of knowing that defendant's tariffed rates earned excessive returns and, therefore, no basis for a claim of damages. Under the circumstances, Section 415 poses no bar to complainant's claims.

[9] For purposes of this calculation, defendant should assume a study area defined by the geographical reach of defendant's filed tariffs, a maximum allowable rate of return of 13.1 percent per overall interstate earnings, and a maximum allowable rate of return for any access service category of 13.25 percent. These assumptions are consistent with 47 C.F.R. § 65.701(b) and the Commission's Order in Phase I of Docket No. 84-800, *supra.* Calculations should be explained fully with evidentiary support adequate to allow the Bureau and complainant to evaluate defendant's arguments and support documentation. To the extent defendant wishes to re-submit materials previously submitted in its Answer, defendant is encouraged to do so as long as the relation of such materials to defendant's arguments is clearly set out. All pleadings and information submitted, in addition to those submitted in response to this Order, will be duly considered in making a final determination in this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS
CORPORATION,
Complainant,

v. File No. E-88-52

MICHIGAN BELL TELEPHONE
COMPANY,
Defendant.

ORDER TO SHOW CAUSE

Adopted: July 26, 1989; Released: July 27, 1989

By the Deputy Chief, Common Carrier Bureau:

1. Pursuant to this Order, issued in the above-referenced formal complaint proceeding, we direct Michigan Bell Telephone Company ("defendant") to show cause why it should not pay certain damages, to be determined in conformity with this Order, to MCI Telecommunications Corporation ("complainant").

I. BACKGROUND

2. The instant complaint was filed on February 9, 1988. Complainant alleges that defendant's rates for interstate access services for the period October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 201(b). Complainant's allegations derive from its assertions that filings made with the Commission by the defendant for the 15 month period at issue establish that the defendant's earned a return of 13.37 percent in the interstate switched traffic sensitive category which is in excess of the lawful rate of return prescribed by the Commission in CC Docket No. 84-800. *See Authorized Rates of Return for the Interstate Service of AT&T Communications and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, FCC 85-527.[1] Complaint, at 3-4. Complainant seeks damages in an amount equal to the difference between interstate access service rates it actually paid during the period October 1, 1985 through December 31, 1986 and the amount it would have paid if the defendants' charges had earned no more than the prescribed rate of return established by the Commission in Phase I of its Docket No. 84-800 rate of return proceeding, plus accumulated interest. Complaint, at 4.

3. In its Answer, defendant denies that complainant has stated a valid cause of action pursuant to Sections 206-209 of the Act, alleges various procedural irregularities in connection with the complaint, disputes the propriety of Commission-ordered relief and claims that portions of the damages claim are, in any event, barred by the limitations provisions of 47 U.S.C. § 415. Answer, at 3-6. Additionally, defendant filed a Motion to Dismiss on March 30, 1988 which complainant has opposed. We deny the Motion to Dismiss to the extent we conclude that complainant has established a *prima facie* case that defendant's tariffed interstate access rates produced revenues unlawfully in excess of the Commission's rate of return prescription and order the defendant to show cause why it should not pay damages. We defer ruling on all other issues raised in defendant's Motion to Dismiss.

II. DISCUSSION

4. Based on the record before us, we conclude that the complainant has made out a *prima facie* case of a violation of the Communications Act for which damages may lie. Accordingly, the defendant is ordered to show cause why damages should not be remitted to the plaintiff in the amount of the difference between the rates it paid and those rates that would have secured for the defendant a level of earnings no greater than authorized.

5. Under the Communications Act, the Commission regulates the rates carriers may charge for interstate telecommunications services. 47 U.S.C. §§ 201-205. As part of that process, the Commission sets the rate of return on capital that carriers use in connection with the recovery of that portion of their costs apportioned to the interstate jurisdiction.[2] The Commission also has prescribed for all local exchange carriers (LECs), including the defendant, a methodology commonly known as the "access charge system," which carriers are required to follow in tariffing interstate services. This methodology determines, *inter alia*, the carriers' rate structure and the allocation of costs within that structure.[3] For the time period at issue in the instant complaint, from October 1, 1985, through December 31, 1986, carriers were required to target their interstate access rates to earn a 12.75 percent return on their capital. Carriers also were notified by the Commission that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate access earnings during this period and 13.25 percent would be the maximum allowable rate of return on any access service category.[4]

6. The Act also provides that "any person" may petition the Commission in complaint of "anything done or omitted to be done" by a common carrier in contravention of the Act, that carriers shall be liable "for the full amount of damages sustained in consequence of any such violation," and that the Commission shall order the payment of damages in reparation of such violation(s). 47 U.S.C. §§ 206, 208-209.

7. The complainant alleges that it has been damaged because it has paid to the defendant charges for interstate access that yielded rates of return that exceeded the Commission's prescribed rate of return. In support of its complaint, the complainant points to a rate of return monitoring report filed with this Commission by defendant which shows that for the period October 1, 1985 through December 31, 1986 defendant earned a return of 13.37 percent on interstate access in the switched traffic sensitive category. Complainant states that because defendant's rate of return exceeded the rate prescribed by the Commission, defendant's charges for interstate access as set forth in its tariff were unjust and unreasonable under Section 201(b) of the Act, that the complainant has been damaged by having to pay such rates and that it is entitled to reparations.

8. The crux of defendant's argument in both its Answer and Motion to Dismiss may be summarized as follows. Defendant maintains that the rates at issue were not carrier initiated rates and, therefore, the Commission lacks authority to award damages even if it determines that any particular rate or category of rates were unjust and unreasonable. Answer at 4-6; Motion to Dismiss at 14-17. As a related argument, defendant adds that assuming the rates are deemed carrier initiated, the complaint fails to state a cause of action because Commission policy dictates that damages based on a complaint for rates found to be unjust and unreasonable may only be awarded prospectively from the date a complaint is filed. Answer at 5-6; Motion to Dismiss at 17-18. Finally, defendant states that the rate of return monitoring reports relied on by complainants establish that it earned a return of only 12.99 on interstate access overall, below the maximum level prescribed by the Commission. Answer at 3; Motion to Dismiss at 12. Therefore, defendant claims, the instant complaint cannot lie given the ruling of the Court striking down the automatic refund mechanism. Motion to Dismiss at 11-14.

9. The defendant is wrong in claiming that it cannot be held liable in a complaint proceeding for alleged overearnings on its access rates because such rates are prescribed by the Commission. The Commission did not prescribe the specific rates subject to complaint in the instant proceeding, nor have these carrier-initiated rates somehow been transformed into prescribed rates because the defendant, in developing its rates, was required to follow certain Commission rules and procedures.[5] Defendant's reliance on the Court's decision in *AT&T v. FCC* is also misplaced. The Court in that case did not discuss Section 208 proceedings, nor did it purport to alter the statutory scheme of the Communications Act or to limit the remedies Congress established therein. *See* para. 6 *supra*. Moreover, as indicated above, the Court previously recognized that the Commission has the power to prescribe an authorized rate of return. The defendant's own filing with the Commission shows that the rates at issue generated revenues for the defendant which exceed the authorized rate of return level for the relevant study period, in this case, the 15 month period established by the formal complaint and consistent with the reporting period established in Docket 84-800.[6] This is enough to make out a *prima facie* case of a Communication's Act violation and is sufficient support for a complaint under Section 208 of the Act. Finally, we have found no authority to support defendant's claim that damages based on a claim that carrier-initiated rates are unjust and unreasonable may only be awarded prospectively from the date a complaint is filed with the Commission.

10. We cannot find in the defendant's Answer or Motion to Dismiss sufficient rationale to deny the plaintiff the relief it seeks. Although the current record arguably provides a legally adequate basis to support Commission action at this time,[7] we are providing the defendant an additional opportunity to show cause why the Commission should not order the payment of damages sought by the plaintiff.[8] The defendant also is directed to provide a calculation of such damages for each service and/or service segment as alleged in the instant complaint within twenty days of the release of this Order.[9] Thereafter, complainant is afforded ten days within which to reply to defendant's showing.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that Michigan Bell Telephone Company SHOW CAUSE within 20 days of the release of this Order why it should not remit to complainant damages due and owing as specified in complainant's complaint and pursuant to the guidelines set our herein.

12. IT IS FURTHER ORDERED that MCI Telecommunications Corporation may file comments on the Michigan Bell Telephone Company submission no later than 10 days after the filing of that submission with the Commission.

13. This Order is issued pursuant to delegated authority under 47 C.F.R. Section 0.291 and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] Several parties sought judicial review of the portion of the Commission's decision in Docket 84-800 that ordered automatic refunds of carrier earnings in excess of the prescribed return. The D.C. Circuit Court of Appeals invalidated the Commission's decision in that regard. *See American Telephone and Telegraph Co. v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) ("*AT&T v. FCC*"), *cert. denied*, _____ U.S. _____ (1989). No party challenged the rate of return prescription itself, and that prescription remains valid.

[2] *Nader v. FCC*, 520 F.2d 182, 203-04 (D.C. Cir. 1975).

[3] *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[4] *See* 47 C.F.R. § 65.701.

[5] Although the Commission's rate of return prescription protects a carrier from the possibility of liability on the grounds that earnings at the prescribed level are too high, "the Commission retains full latitude to order refunds on all other grounds." *Nader v. FCC*, 520 F.2d at 205 n.25. Moreover, while the Commission's access charge rules include many of the steps that carriers must follow in order to compute rates, these rules neither prescribe a specific revenue requirement nor "determine the legality of specific rates." *National Assoc. of Reg. Commr's v. FCC*, 737 F.2d 1095, *cert. denied*, 469 U.S. 1227 (1985).

[6] We note that in *AT&T v. FCC*, the Court indicated that the Commission's automatic refund mechanism might have survived challenge if it had provided a means for taking into account the impact of a refund obligation on a carrier's overall rate of return. 836 F.2d at 1390 n.4. As noted previously, the holding and opinion in that case are not controlling here. If in response to this order to show cause, however, defendant elects to argue that the Commission should consider the impact on the defendant's overall return that would result from an award of damages in the instant proceeding, the defendant should include in its response a precise accounting of that impact.

[7] The Commission's Rules provide that formal complaints generally are resolved on a written record consisting of a complaint, answer, and reply. 47 C.F.R. § 1.720. The defendant has filed its answer and could not argue plausibly that judgment at this point in the proceeding violated its due process rights.

[8] Defendant's contention that portions of complainant's damage claims are barred by Section 415 of the Act is unavailing. The purpose of Section 415 is "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed." Bunker Ramo Corp., 31 FCC 2d 449, 453 (1971). The statute is not discretionary and the lapse of time beyond the limitation period not only bars the remedy but also destroys the liability. Armstrong Utilities, Inc. v. General Telephone Co. of Pennsylvania, 25 FCC 2d 385 (1970); cf. Midstate Co. v. Pennsylvania R. Co., 320 U.S. 356, 363-64 (1943); Kansas City So. R. Co. v. Wolf, 201 U.S. 133 (1923). The construction of Section 415 by the Commission and the federal courts has been strict and exceptions to its application have been confined to narrow circumstances. *Id.*; *see* Thornwell Barnes Co. v. Illinois Bell, 1 FCC 2d 1247 (1967); Ward v. Northern Ohio Telephone Company, 251 F. Supp. 606, *aff'd*, 381 F.2d 16 (6th Cir. 1967). In *Bunker Ramo*, *supra*, however, the Commission's Review Board identified two basic situations in which the strict application of the statute may be altered or affected:

> First, a statute of limitations does not begin to run until discovery of the right or wrong or of the facts on which such knowledge is chargeable in law. Secondly, the running of the period of limitations may be suspended or tolled by various causes; for example, although mere ignorance will generally not toll the statute, active fraudulent concealment by a defendant will generally do so. 31 FCC 2d at 454.

The Review Board stated that "a defendant should not be permitted to interpose the statutory time limit as a defense where his conduct is the primary reason for the tardiness of the plaintiff's action." *Id.* Thus, even though Section 415 is a substantive and jurisdictional statute of limitations, the period of limitations may nevertheless be tolled in limited circumstances. Consistent with these guidelines, we conclude that the discovery of the "right or wrong" in the instant case occurred within the meaning of Section 415 when defendant filed its rate of return monitoring reports. Those reports showed that defendant had earned excessive returns on certain interstate access service categories for the relevant period. Until such time, complainant had no way of knowing that defendant's tariffed rates earned excessive returns and, therefore, no basis for a claim of damages. Under the circumstances, Section 415 poses no bar to complainant's claims.

[9] For purposes of this calculation, defendant should assume a study area defined by the geographical reach of defendant's filed tariffs and a maximum allowable rate of return of 13.1 percent overall rate of return, and a maximum allowable rate of return for any access service category of 13.25 percent. These assumptions are consistent with 47 C.F.R. § 65.701(b) and the Commission's Order in Phase I of Docket No. 84-800, *supra*. Calculations should be explained fully with evidentiary support adequate to allow the Bureau and complainant to evaluate defendant's arguments and support documentation. To the extent the defendant wishes to re-submit materials previously submitted in its Answer, it is encouraged to do so so as long as the relation of such materials to defendant's arguments is clearly set out. All pleadings and information submitted thus far, in addition to those submitted in response to this Order, will be duly considered in making a final determination in this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION,
Complainant,

v. File No. E-88-51

MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY,
Defendant.

ORDER TO SHOW CAUSE

Adopted: July 26, 1989; Released: July 27, 1989

By the Deputy Chief, Common Carrier Bureau:

1. Pursuant to this Order, issued in the above-referenced formal complaint proceeding, we direct Mountain States Telephone & Telegraph Company ("defendant") to show cause why it should not pay certain damages, to be determined in conformity with this Order, to MCI Telecommunications Corporation ("complainant").

I. BACKGROUND

2. The instant complaint was filed on February 9, 1988. Complainant alleges that defendant's rates for interstate access services for the period October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 201(b). Complainant's allegations derive from its assertions that filings made with the Commission by the defendant for the 15 month period at issue establish that the defendant earned a return in the switched traffic sensitive category which is in excess of the lawful rate of return prescribed by the Commission in CC Docket No. 84-800. *See Authorized Rates of Return for the Interstate Service of AT&T Communications and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, FCC 85-527.[1] Complaint, at 3. Complainant seeks damages in an amount equal to the difference between interstate access service rates it actually paid during the relevant time period and the amount it would have paid if the defendant's charges had earned within the zone of reasonableness established by the Commission in Phase I of its Docket No. 84-800 rate of return proceeding, plus accumulated interest. Complaint, at 4.

3. In its Answer,[2] defendant denies that complainant has stated a valid cause of action pursuant to Sections 206-209 of the Act, alleges various procedural irregularities in connection with the complaint, disputes the propriety of Commission-ordered relief and claims that portions of the damages claim are, in any event, barred by the limitations provisions of 47 U.S.C. § 415. Answer, at 4-8. Additionally, defendant filed a Motion to Dismiss on March 31, 1988 which complainant has opposed. We deny the Motion to Dismiss to the extent we conclude that complainant has established a *prima facie* case that defendant's tariffed interstate access rates produced revenues unlawfully in excess of the Commission's rate of return prescription and order the defendant to show cause why it should not pay damages. We defer ruling on all other issues raised by the defendant's Motion to Dismiss.

II. DISCUSSION

4. Based on the record before us, we conclude that the complainant has made a *prima facie* case of a violation of the Communications Act for which damages may lie. Accordingly, the defendant is ordered to show cause why damages should not be remitted to the plaintiff in the amount of the difference between the rates it paid and those rates that would have secured for the defendant a level of earnings no greater than those authorized.

5. Under the Communications Act, the Commission regulates the rates carriers may charge for interstate telecommunications services. 47 U.S.C. §§ 201-205. As part of that process, the Commission sets the rate of return on capital that carriers use in connection with the recovery of that portion of their costs apportioned to the interstate jurisdiction.[3] The Commission also has prescribed for all local exchange carriers (LECs), including the defendant, a methodology commonly known as the "access charge system," which carriers are required to follow in tariffing interstate services. This methodology determines, *inter alia*, the carriers' rate structure and the allocation of costs within that structure.[4] For the time period at issue in the instant complaint, from October 1, 1985, through December 31, 1986, carriers were required to target their interstate access rates to earn a 12.75 percent return on their capital. Carriers also were notified by the Commission that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate access earnings during this period and 13.25 percent would be the maximum allowable rate of return for any access service category.[5]

6. The Act also provides that "any person" may petition the Commission in complaint of "anything done or omitted to be done" by a common carrier in contravention of the Act, that carriers shall be liable "for the full amount of damages sustained in consequence of any such violation," and that the Commission shall order the payment of damages in reparation of such violation(s). 47 U.S.C. §§ 206, 208-209.

7. The complainant alleges that it has been damaged because it has paid to the defendant charges for interstate access that yielded rates of return that exceeded the Commission's prescribed rate of return. In support of its complaint, the complainant points to a rate of return monitoring report filed with this Commission by defendant which shows that for the period October 1, 1985 through December 31, 1986, defendant earned returns in the switched traffic sensitive category of 14.60 percent in the state of Arizona, 15.81 percent in Idaho, 15.20 percent in Montana, 14.97 percent in New Mexico, 13.67 percent in Utah and 14.93 percent in Wyoming. Complainant states that because defendant's rates of return exceeded the rate prescribed by the Commission, defendant's charges for interstate access as set forth in its tariffs were unjust

and unreasonable under Section 201(b) of the Act, that the complainant has been damaged by having to pay such rates and that it is entitled to reparations.

8. The crux of defendant's argument in both its Answer and Motion to Dismiss is that the instant complaint cannot lie given the ruling of the court striking down the automatic refund mechanism. Answer, at 6; Motion to Dismiss at 3-4. The defendant claims, in effect, that complainant's request for damages is nothing but a disguised request that the Commission order the automatic refund the court found unlawful.

9. Defendant's reliance on *AT&T v. FCC* in its Answer and in support of its Motion to Dismiss is unfounded. The Court in that case did not discuss Section 208 proceedings, nor did it purport to alter the statutory scheme of the Communications Act or limit the remedies Congress established therein. Moreover, the Court previously has recognized that the Commission has the power to prescribe an authorized rate of return. The defendant's own filing with the Commission shows that the rates at issue generated revenues for the defendant which exceed authorized rate of return levels for the relevant study period, in this case, the 15 month period established by the formal complaint and consistent with the reporting period established in Docket 84-800.[6] This is enough to make out a *prima facie* case of a Communication's Act violation and is sufficient support for a Section 208 complaint.

10. We cannot find in the defendant's answer or Motion to Dismiss sufficient rationale to deny the complainant the relief it seeks. Although the current record arguably provides a legally adequate basis to support Commission action at this time,[7] we are providing the defendant an additional opportunity to show cause why the Commission should not order the payment of damages sought by the complainant.[8] The defendant also is directed to provide a calculation of such damages for each service and/or service segment as alleged in the instant complaint within twenty days of the release of this Order.[9] Thereafter, complainant is afforded ten days within which to reply to defendant's showing.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that Mountain States Telephone & Telegraph Company SHOW CAUSE within 20 days of the release date of this Order why it should not remit to complainant damages due and owing as specified in complainant's complaint and pursuant to the guidelines set out herein.

12. IT IS FURTHER ORDERED that MCI Telecommunications Corporation may file comments on the Mountain States Telephone & Telegraph Company submission no later than 10 days after the filing of that submission with the Commission.

13. This Order is issued pursuant to delegated authority under 47 C.F.R. Section 0.291 and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] Several parties sought judicial review of the portion of the Commission's decision in Docket 84-800 that ordered automatic refunds of carrier earnings in excess of the prescribed return. The D.C. Circuit Court of Appeals invalidated the Commission's decision in that regard. *See American Telephone and Telegraph Co. v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) ("*AT&T v. FCC*"), *cert. denied*, _____ U.S. _____ (1989). No party challenged the rate of return prescription itself, and that prescription remains valid.

[2] We note that MCI filed companion complaints against the three US West, Inc. companies including Pacific Northwest Bell, Mountain States Telephone and Telegraph Co. and Northwestern Bell Telephone Co. The defendants collectively filed a Joint Answer and Joint Motion to Dismiss MCI's complaints. In the interest of clear and unambiguous disposition of these matters, we will treat the Joint Answer and Joint Motion to Dismiss on an individual defendant basis in each complaint proceeding.

[3] *Nader v. FCC*, 520 F.2d 182, 203-04 (D.C. Cir. 1975).

[4] *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[5] *See* 47 C.F.R. § 65.701.

[6] We note that in *AT&T v. FCC*, the Court indicated that the Commission's automatic refund mechanism might have survived challenge if it had provided a means for taking into account the impact of a refund obligation on a carrier's overall return. 836 F.2d at 1390 n.4. As noted previously, the holding and opinion in that case are not controlling here. If in response to this order to show cause, however, defendant elects to argue that the Commission should consider the impact on the defendant's overall return that would result from an award of damages in the instant proceeding, the defendant should include in its response a precise accounting of that impact.

[7] The Commission's Rules provide that formal complaints generally are resolved on a written record consisting of a complaint, answer, and reply. 47 C.F.R. § 1.720. The defendant has filed its answer and could not argue plausibly that judgment at this point in the proceeding violated its due process rights.

[8] Defendant's contention that portions of complainant's damage claims are barred by Section 415 of the Act is unavailing. The purpose of Section 415 is "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed." Bunker Ramo Corp., 31 FCC 2d 449, 453 (1971). The statute is not discretionary and the lapse of time beyond the limitation period not only bars the remedy but also destroys the liability. Armstrong Utilities, Inc. v. General Telephone Co. of Pennsylvania, 25 FCC 2d 385 (1970); cf. Midstate Co. v. Pennsylvania R. Co., 320 U.S. 356, 363-64 (1943); Kansas City So. R. Co. v. Wolf, 201 U.S. 133 (1923). The construction of Section 415 by the Commission and the federal courts has been strict and exceptions to its application have been confined to narrow circumstances. *Id.*; *see* Thornwell Barnes Co. v. Illinois Bell, 1 FCC 2d 1247 (1967);

Ward v. Northern Ohio Telephone Company, 251 F. Supp. 606, *aff'd*, 381 F.2d 16 (6th Cir. 1967). In *Bunker Ramo*, *supra*, however, the Commission's Review Board identified two basic situations in which the strict application of the statute may be altered or affected:

> First, a statute of limitations does not begin to run until discovery of the right or wrong or of the facts on which such knowledge is chargeable in law. Secondly, the running of the period of limitations may be suspended or tolled by various causes; for example, although mere ignorance will generally not toll the statute, active fraudulent concealment by a defendant will generally do so. 31 FCC 2d at 454.

The Review Board stated that "a defendant should not be permitted to interpose the statutory time limit as a defense where his conduct is the primary reason for the tardiness of the plaintiff's action. *Id.* Thus, even though Section 415 is a substantive and jurisdictional statute of limitations, the period of limitations may nevertheless be tolled in limited circumstances. Consistent with these guidelines, we conclude that the discovery of the "right or wrong" in the instant case occurred within the meaning of Section 415 when defendant filed its rate of return monitoring reports. Those reports showed that defendant had earned excessive returns on certain interstate access service categories for the relevant period. Until such time, complainant had no way of knowing that defendant's tariffed rates earned excessive returns and, therefore, no basis for a claim of damages. Under the circumstances, Section 415 poses no bar to complainant's claims.

[9] For purposes of this calculation, defendant should assume a study area defined by the geographical reach of defendant's filed tariffs, a maximum allowable rate of return of 13.1 percent per overall interstate earnings, and a maximum allowable rate of return for any access service category of 13.25 percent. These assumptions are consistent with 47 C.F.R. § 65.701(b) and the Commission's Order in Phase I of Docket No. 84-800, *supra*. Calculations should be explained fully with evidentiary support adequate to allow the Bureau and complainant to evaluate defendant's arguments and support documentation. To the extent defendant wishes to re-submit materials previously submitted in its Answer, defendant is encouraged to do so as long as the relation of such materials to defendant's arguments is clearly set out. All pleadings and information submitted thus far, in addition to those submitted in response to this Order, will be duly considered in making a final determination in this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS
CORPORATION,
Complainant,

v. File No. E-88-50

NEW JERSEY BELL
TELEPHONE COMPANY,
Defendant.

ORDER TO SHOW CAUSE

Adopted: July 26, 1989; Released: July 27, 1989

By the Deputy Chief, Common Carrier Bureau:

1. Pursuant to this Order, issued in the above-referenced formal complaint proceeding, we direct New Jersey Bell Telephone Company ("defendant") to show cause why it should not pay certain damages, to be determined in conformity with this Order, to MCI Telecommunications Corporation ("complainant").

I. BACKGROUND

2. The instant complaint was filed on February 9, 1988. Complainant alleges that defendant's rates for interstate access services for the period October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 201(b). Complainant's allegations derive from its assertions that filings made with the Commission by the defendant for the 15 month period at issue establish that the defendant earned a rate of return of 14.74 percent in the switched traffic sensitive access service category which is in excess of the lawful rate of return prescribed by the Commission in CC Docket No. 84-800. *See Authorized Rates of Return for the Interstate Service of AT&T Communications and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, FCC 85-527.[1] Complaint, at 3. Complainant seeks damages in an amount equal to the difference between interstate access service rates it actually paid during the relevant time period and the amount it would have paid if the defendant's charges had earned within the zone of reasonableness established by the Commission in Phase I of its Docket No. 84-800 rate of return proceeding, plus accumulated interest. Complaint, at 4.

3. In its Consolidated Answer and Motion to Dismiss,[2] defendant denies that complainant has stated a valid cause of action pursuant to Sections 206-209 of the Act, and states that complainant is not entitled to the relief sought. Answer, at 1-4. Complainant has opposed the Motion to Dismiss. We deny the Motion to Dismiss to the extent we conclude that complainant has established a *prima facie* case that defendant's tariffed interstate access rates produced revenues unlawfully in excess of the Commission's rate of return prescription and order the defendant to show cause why it should not pay damages. We defer ruling on all other issues raised in defendant's Motion to Dismiss.

II. DISCUSSION

4. Based on the record before us, we conclude that the complainant has made a *prima facie* case of a violation of the Communications Act for which damages may lie. Accordingly, the defendant is ordered to show cause why damages should not be remitted to the plaintiff in the amount of the difference between the rates it paid and those rates that would have secured for the defendant a level of earnings no greater than those authorized.

5. Under the Communications Act, the Commission regulates the rates carriers may charge for interstate telecommunications services. 47 U.S.C. §§ 201-205. As part of that process, the Commission sets the rate of return on capital that carriers use in connection with the recovery of that portion of their costs apportioned to the interstate jurisdiction.[3] The Commission also has prescribed for all local exchange carriers (LECs), including the defendant, a methodology commonly known as the "access charge system," which carriers are required to follow in tariffing interstate services. This methodology determines, *inter alia*, the carriers' rate structure and the allocation of costs within that structure.[4] For the time period at issue in the instant complaint, from October 1, 1985, through December 31, 1986, carriers were required to target their interstate access rates to earn a 12.75 percent return on their capital. Carriers also were notified by the Commission that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate access earnings during this period and 13.25 percent would be the maximum allowable rate of return on individual access service categories.[5]

6. The Act also provides that "any person" may petition the Commission in complaint of "anything done or omitted to be done" by a common carrier in contravention of the Act, that carriers shall be liable "for the full amount of damages sustained in consequence of any such violation," and that the Commission shall order the payment of damages in reparation of such violation(s). 47 U.S.C. §§ 206, 208-209.

7. The complainant alleges that it has been damaged because it has paid to the defendant charges for interstate access that yielded rates of return that exceeded the Commission's prescribed rate of return. In support of its complaint, the complainant points to a rate of return monitoring report filed with this Commission by defendant which shows that for the period October 1, 1985 through December 31, 1986, defendant earned a return in the switched traffic sensitive category of 14.74 percent. Complainant states that because defendant's rates of return exceeded the rate prescribed by the Commission, defendant's charges for interstate access as set forth in its tariffs were unjust and unreasonable under Section 201(b) of the Act, that the complainant has been damaged by having to pay such rates, and that it is entitled to reparations.

8. The crux of defendant's argument in its Answer and Motion to Dismiss is that the instant complaint cannot lie given the ruling of the court striking down the automatic

refund mechanism and given the fact that the defendant did not earn in excess of the applicable rate of return on an overall basis. Answer, at 1-2. Defendant claims, in effect, that complainant's request for damages is nothing but a disguised request that the Commission order the automatic refund the court found unlawful.

9. Defendant's reliance on *AT&T v. FCC* in its Answer and Motion to Dismiss is unfounded. The Court in that case did not discuss Section 208 proceedings, nor did it purport to alter the statutory scheme of the Communications Act or limit the remedies Congress established therein. Moreover, the Court previously has recognized that the Commission has the power to prescribe an authorized rate of return. The defendant's own filing with the Commission shows that the rates at issue generated revenues for the defendant which exceed authorized rate of return levels for the relevant study period, in this case, the 15 month period established by the formal complaint and consistent with the reporting period established in Docket 84-800.[6] This is enough to make out a *prima facie* case of a Communication's Act violation and is sufficient support for a Section 208 complaint.

10. We cannot find in the defendant's Answer and Motion to Dismiss sufficient rationale to deny the complainant the relief it seeks. Although the current record arguably provides a legally adequate basis to support Commission action at this time,[7] we are providing the defendant an additional opportunity to show cause why the Commission should not order the payment of damages sought by the complainant. The defendant also is directed to provide a calculation of such damages for each service and/or service segment as alleged in the instant complaint within twenty days of the release of this Order.[8] Thereafter, complainant is afforded ten days within which to reply to defendant's showing.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that New Jersey Bell Telephone Company SHOW CAUSE within 20 days of the release date of this Order why it should not remit to complainant damages due and owing as specified in complainant's complaint and pursuant to the guidelines set out herein.

12. IT IS FURTHER ORDERED that MCI Telecommunications Corporation may file comments on the New Jersey Bell Telephone Company submission no later than 10 days after the filing of that submission with the Commission.

13. This Order is issued pursuant to delegated authority under 47 C.F.R. Section 0.291 and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] Several parties sought judicial review of the portion of the Commission's decision in Docket 84-800 that ordered automatic refunds of carrier earnings in excess of the prescribed return. The D.C. Circuit Court of Appeals invalidated the Commission's decision in that regard. *See American Telephone and Telegraph Co. v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) ("*AT&T v. FCC*"), *cert. denied*, _____ U.S. _____ (1989). No party challenged the rate of return prescription itself, and that prescription remains valid.

[2] MCI filed similar complaints against a number of local exchange carriers. New Jersey Bell, along with The Chesapeake & Potomac Telephone Companies and The Diamond State Telephone Company, collectively filed a Consolidated Answer and Motion to Dismiss MCI's complaints. In the interest of clear and unambiguous disposition of these matters, we will treat the Consolidated Answer and Motion to Dismiss on an individual defendant basis pleading in each complaint proceeding.

[3] *Nader v. FCC*, 520 F.2d 182, 203-04 (D.C. Cir. 1975).

[4] *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[5] *See* 47 C.F.R. § 65.701.

[6] We note that in *AT&T v. FCC*, the Court indicated that the Commission's automatic refund mechanism might have survived challenge if it had provided a means for taking into account the impact of a refund obligation on a carrier's overall rate of return. 836 F.2d at 1390 n.4. As noted previously, the holding and opinion in that case are not controlling here. If in response to this order to show cause, however, defendant elects to argue that the Commission should consider the impact on the defendant's overall return that would result from an award of damages in the instant proceeding, the defendant should include in its response a precise accounting of that impact.

[7] The Commission's Rules provide that formal complaints generally are resolved on a written record consisting of a complaint, answer, and reply. 47 C.F.R. § 1.720. The defendant has filed its answer and could not argue plausibly that judgment at this point in the proceeding violated its due process rights.

[8] For purposes of this calculation, defendant should assume a study area defined by the geographical reach of defendant's filed tariffs, a maximum allowable rate of return of 13.1 percent per overall interstate earnings, and a maximum allowable rate of return for any access service category of 13.25 percent. These assumptions are consistent with 47 C.F.R. § 65.701(b) and the Commission's Order in Phase I of Docket No. 84-800, *supra*. Calculations should be explained fully with evidentiary support adequate to allow the Bureau and complainant to evaluate defendant's arguments and support documentation. To the extent defendant wishes to re-submit materials previously submitted in its Answer, defendant is encouraged to do so as long as the relation of such materials to defendant's arguments is clearly set out. All pleadings and information submitted thus far, in addition to those submitted in response to this Order, will be duly considered in making a final determination in this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS
CORPORATION,
Complainant,

v. File No. E-88-49

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANIES,
Defendant.

ORDER TO SHOW CAUSE

Adopted: July 26, 1989; Released: July 27, 1989

By the Deputy Chief, Common Carrier Bureau:

1. Pursuant to this Order, issued in the above-referenced formal complaint proceeding, we direct The Chesapeake & Potomac Telephone Companies ("defendant") to show cause why it should not pay certain damages, to be determined in conformity with this Order, to MCI Telecommunications Corporation ("complainant").

I. BACKGROUND

2. The instant complaint was filed on February 9, 1988. Complainant alleges that defendant's rates for interstate access services for the period October 1, 1985, through December 31, 1986, were unjust and unreasonable in violation of Section 201(b) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 201(b). Complainant's allegations derive from its assertions that filings made with the Commission by the defendant for the 15 month period at issue establish that the defendant earned a rate of return of 13.38 percent in the switched traffic sensitive access service category which is in excess of the lawful rate of return prescribed by the Commission in CC Docket No. 84-800. *See Authorized Rates of Return for the Interstate Service of AT&T Communications and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, FCC 85-527.[1] Complaint, at 3. Complainant seeks damages in an amount equal to the difference between interstate access service rates it actually paid during the relevant time period and the amount it would have paid if the defendant's charges had earned within the zone of reasonableness established by the Commission in Phase I of its Docket No. 84-800 rate of return proceeding, plus accumulated interest. Complaint, at 4.

3. In its Consolidated Answer and Motion to Dismiss,[2] defendant denies that complainant has stated a valid cause of action pursuant to Sections 206-209 of the Act and states that complainant is not entitled to the relief sought. Answer, at 1-4. Complainant has opposed the Motion to Dismiss. We deny the Motion to Dismiss to the extent we conclude that complainant has established a *prima facie* case that defendant's tariffed interstate access rates produced revenues unlawfully in excess of the Commission's rate of return prescription and order the defendant to show cause why it should not pay damages. We defer ruling on all other issues raised in defendant's Motion to Dismiss.

II. DISCUSSION

4. Based on the record before us, we conclude that the complainant has made a *prima facie* case of a violation of the Communications Act for which damages may lie. Accordingly, the defendant is ordered to show cause why damages should not be remitted to the plaintiff in the amount of the difference between the rates it paid and those rates that would have secured for the defendant a level of earnings no greater than those authorized.

5. Under the Communications Act, the Commission regulates the rates carriers may charge for interstate telecommunications services. 47 U.S.C. §§ 201-205. As part of that process, the Commission sets the rate of return on capital that carriers use in connection with the recovery of that portion of their costs apportioned to the interstate jurisdiction. [3] The Commission also has prescribed for all local exchange carriers (LECs), including the defendant, a methodology commonly known as the "access charge system," which carriers are required to follow in tariffing interstate services. This methodology determines, *inter alia*, the carriers' rate structure and the allocation of costs within that structure.[4] For the time period at issue in the instant complaint, from October 1, 1985, through December 31, 1986, carriers were required to target their interstate access rates to earn a 12.75 percent return on their capital. Carriers also were notified by the Commission that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate access earnings during this period, and 13.25 percent would be the maximum allowable rate of return for any access service category.[5]

6. The Act also provides that "any person" may petition the Commission in complaint of "anything done or omitted to be done" by a common carrier in contravention of the Act, that carriers shall be liable "for the full amount of damages sustained in consequence of any such violation," and that the Commission shall order the payment of damages in reparation of such violation(s). 47 U.S.C. §§ 206, 208-209.

7. The complainant alleges that it has been damaged because it has paid to the defendant charges for interstate access that yielded rates of return that exceeded the Commission's prescribed rate of return. In support of its complaint, the complainant points to a rate of return monitoring report filed with this Commission by defendant which shows that for the period October 1, 1985, through December 31, 1986, defendant earned a return of 13.38 percent in the switched traffic sensitive category. Complainant states that because defendant's rates of return exceeded the rate prescribed by the Commission, defendant's charges for interstate access as set forth in its tariffs were unjust and unreasonable under Section 201(b) of the Act, that the complainant has been damaged by having to pay such rates, and that it is entitled to reparations.

8. The crux of defendant's argument in its Answer and Motion to Dismiss is that the instant complaint cannot lie given the ruling of the court striking down the automatic

refund mechanism and given the fact that the defendant did not earn in excess of the applicable rate of return on an overall basis. Answer, at 1-2. The defendant claims, in effect, that complainant's request for damages is nothing but a disguised request that the Commission order the automatic refund the court found unlawful.

9. Defendant's reliance on *AT&T v. FCC* in its Answer and Motion to Dismiss is unfounded. The Court in that case did not discuss Section 208 proceedings, nor did it purport to alter the statutory scheme of the Communications Act or limit the remedies Congress established therein. Moreover, the Court previously has recognized that the Commission has the power to prescribe an authorized rate of return. The defendant's own filing with the Commission shows that the rates at issue generated revenues for the defendant which exceed authorized rate of return levels for the relevant study period, in this case, the 15 month period established by the formal complaint and consistent with the reporting period established in Docket 84-800.[6] This is enough to make out a *prima facie* case of a Communication's Act violation and is sufficient support for a Section 208 complaint.

10. We cannot find in the defendant's Answer and Motion to Dismiss sufficient rationale to deny the complainant the relief it seeks. Although the current record arguably provides a legally adequate basis to support Commission action at this time,[7] we are providing the defendant an additional opportunity to show cause why the Commission should not order the payment of damages sought by the complainant.[8] The defendant also is directed to provide a calculation of such damages for each service and/or service segment as alleged in the instant complaint within twenty days of the release of this Order.[9] Thereafter, complainant is afforded ten days within which to reply to defendant's showing.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that The Chesapeake & Potomac Telephone Companies SHOW CAUSE within 20 days of the release date of this Order why it should not remit to complainant damages due and owing as specified in complainant's complaint and pursuant to the guidelines set out herein.

12. IT IS FURTHER ORDERED that MCI Telecommunications Corporation may file comments on The Chesapeake & Potomac Telephone Companies submission no later than 10 days after the filing of that submission with the Commission.

13. This Order is issued pursuant to delegated authority under 47 C.F.R. Section 0.291 and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] Several parties sought judicial review of the portion of the Commission's decision in Docket 84-800 that ordered automatic refunds of carrier earnings in excess of the prescribed return. The D.C. Circuit Court of Appeals invalidated the Commission's decision in that regard. *See American Telephone and Telegraph Co. v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) ("*AT&T v. FCC*"), *cert. denied*, _____ U.S. _____ (1989). No party challenged the rate of return prescription itself, and that prescription remains valid.

[2] MCI also filed similar complaints against a number of local exchange carriers. The defendant, along with New Jersey Bell Telephone Company and The Diamond State Telephone Company, collectively filed a Consolidated Answer and Motion to Dismiss MCI's complaints. In the interest of clear and unambiguous disposition of these matters, we will treat the Consolidated Answer and Motion to Dismiss on an individual defendant basis in each complaint proceeding.

[3] *Nader v. FCC*, 520 F.2d 182, 203-04 (D.C. Cir. 1975).

[4] *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[5] *See* 47 C.F.R. § 65.701.

[6] We note that in *AT&T v. FCC*, the Court indicated that the Commission's automatic refund mechanism might have survived challenge if it had provided a means for taking into account the impact of a refund obligation on a carrier's overall rate of return. 836 F.2d at 1390 n.4. As noted previously, the holding and opinion in that case are not controlling here. If in response to this order to show cause, however, defendant elects to argue that the Commission should consider the impact on the defendant's overall return that would result from an award of damages in the instant proceeding, the defendant should include in its response a precise accounting of that impact.

[7] The Commission's Rules provide that formal complaints generally are resolved on a written record consisting of a complaint, answer, and reply. 47 C.F.R. § 1.720. The defendant has filed its answer and could not argue plausibly that judgment at this point in the proceeding violated its due process rights.

[8] Defendant's contention that portions of complainant's damage claims are barred by Section 415 of the Act is unavailing. The purpose of Section 415 is "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed." Bunker Ramo Corp., 31 FCC 2d 449, 453 (1971). The statute is not discretionary and the lapse of time beyond the limitation period not only bars the remedy but also destroys the liability. Armstrong Utilities, Inc. v. General Telephone Co. of Pennsylvania, 25 FCC 2d 385 (1970); cf. Midstate Co. v. Pennsylvania R. Co., 320 U.S. 356, 363-64 (1943); Kansas City So. R. Co. v. Wolf, 201 U.S. 133 (1923). The construction of Section 415 by the Commission and the federal courts has been strict and exceptions to its application have been confined to narrow circumstances. *Id.*; *see* Thornwell Barnes Co. v. Illinois Bell, 1 FCC 2d 1247 (1967); Ward v. Northern Ohio Telephone Company, 251 F. Supp. 606, *aff'd*, 381 F.2d 16 (6th Cir. 1967). In *Bunker Ramo*, *supra*, however, the Commission's Review Board identified two basic situations in which the strict application of the statute may be altered or affected:

> First, a statute of limitations does not begin to run until discovery of the right or wrong or of the facts on which such knowledge is chargeable in law. Secondly, the running of the period of limitations may be suspended or tolled by various causes; for example, although mere ig-

norance will generally not toll the statute, active fraudulent concealment by a defendant will generally do so. 31 FCC 2d at 454.

The Review Board stated that "a defendant should not be permitted to interpose the statutory time limit as a defense where his conduct is the primary reason for the tardiness of the plaintiff's action." *Id.* Thus, even though Section 415 is a substantive and jurisdictional statute of limitations, the period of limitations may nevertheless be tolled in limited circumstances. Consistent with these guidelines, we conclude that the discovery of the "right or wrong" in the instant case occurred within the meaning of Section 415 when defendant filed its rate of return monitoring reports. Those reports showed that defendant had earned excessive returns on certain interstate access service categories for the relevant period. Until such time, complainant had no way of knowing that defendant's tariffed rates earned excessive returns and, therefore, no basis for a claim of damages. Under the circumstances, Section 415 poses no bar to complainant's claims.

[9] For purposes of this calculation, defendant should assume a study area defined by the geographical reach of defendant's filed tariffs, a maximum allowable rate of return of 13.1 percent per overall interstate earnings, and a maximum allowable rate of return for any access service category of 13.25 percent. These assumptions are consistent with 47 C.F.R. § 65.701(b) and the Commission's Order in Phase I of Docket No. 84-800, *supra*. Calculations should be explained fully with evidentiary support adequate to allow the Bureau and complainant to evaluate defendant's arguments and support documentation. To the extent defendant wishes to re-submit materials previously submitted in its Answer, defendant is encouraged to do so as long as the relation of such materials to defendant's arguments is clearly set out. All pleadings and information submitted thus far, in addition to those submitted in response to this Order, will be duly considered in making a final determination in this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS
CORPORATION,
Complainant,

v. File No. E-88-48

WISCONSIN BELL INC.,
Defendant.

ORDER TO SHOW CAUSE

Adopted: July 26, 1989; Released: July 27, 1989

By the Deputy Chief, Common Carrier Bureau:

1. Pursuant to this Order, issued in the above-referenced formal complaint proceeding, we direct Wisconsin Bell Inc. ("defendant") to show cause why it should not pay certain damages, to be determined in conformity with this Order, to MCI Telecommunications Corporation ("complainant").

I. BACKGROUND

2. The instant complaint was filed on February 9, 1988. Complainant alleges that defendant's rates for interstate access services for the period October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 201(b). Complainant's allegations derive from its assertions that filings made with the Commission by the defendant for the 15 month period at issue establish that the defendant's earned a return of 16.66 percent in the interstate switched traffic sensitive category which is in excess of the lawful rate of return prescribed by the Commission in CC Docket No. 84-800. *See Authorized Rates of Return for the Interstate Service of AT&T Communications and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, FCC 85-527.[1] Complaint, at 3-4. Complainant seeks damages in an amount equal to the difference between interstate access service rates actually paid by it for the period October 1, 1985 through December 31, 1986 and the amount it would have paid if the defendants' charges had earned no more than the prescribed rate of return established by the Commission in Phase I of its Docket No. 84-800 rate of return proceeding, plus accumulated interest. Complaint, at 4.

3. In its Answer, defendant denies that complainant has stated a valid cause of action pursuant to Sections 206-209 of the Act, alleges various procedural irregularities in connection with the complaint, disputes the propriety of Commission-ordered relief and claims that portions of the damages claim are, in any event, barred by the limitations provisions of 47 U.S.C. § 415. Answer, at 2-6. Additionally, defendant filed a Motion to Dismiss on March 30, 1988 which complainant has opposed. We deny the Motion to Dismiss to the extent we conclude that complainant has established a *prima facie* case that defendant's tariffed interstate access rates produced revenues unlawfully in excess of the Commission's rate of return prescription and order the defendant to show cause why it should not pay damages. We defer ruling on all other issues raised in defendant's Motion to Dismiss.

II. DISCUSSION

4. Based on the record before us, we conclude that the complainant has made out a *prima facie* case of a violation of the Communications Act for which damages may lie. Accordingly, the defendant is ordered to show cause why damages should not be remitted to the plaintiff in the amount of the difference between the rates it paid and those rates that would have secured for the defendant a level of earnings no greater than authorized.

5. Under the Communications Act, the Commission regulates the rates carriers may charge for interstate telecommunications services. 47 U.S.C. §§ 201-205. As part of that process, the Commission sets the rate of return on capital that carriers use in connection with the recovery of that portion of their costs apportioned to the interstate jurisdiction.[2] The Commission also has prescribed for all local exchange carriers (LECs), including the defendant, a methodology commonly known as the "access charge system," which carriers are required to follow in tariffing interstate services. This methodology determines, *inter alia*, the carriers' rate structure and the allocation of costs within that structure.[3] For the time period at issue in the instant complaint, from October 1, 1985, through December 31, 1986, carriers were required to target their interstate access rates to earn a 12.75 percent return on their capital. Carriers also were notified by the Commission that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate access earnings during this period and 13.25 percent would be the maximum allowable rate of return for any access service category.[4]

6. The Act also provides that "any person" may petition the Commission in complaint of "anything done or omitted to be done" by a common carrier in contravention of the Act, that carriers shall be liable "for the full amount of damages sustained in consequence of any such violation," and that the Commission shall order the payment of damages in reparation of such violation(s). 47 U.S.C. §§ 206, 208-209.

7. The complainant alleges that it has been damaged because it has paid to the defendant charges for interstate access that yielded rates of return that exceeded the Commission's prescribed rate of return. In support of its complaint, the complainant points to a rate of return monitoring report filed with this Commission by defendant which shows that defendant earned a return of 16.66 on interstate access in the switched traffic sensitive category for the period from October 1, 1985, through December 31, 1986. Complainant states that because defendant's rate of return exceeded the rate prescribed by the Commission, defendant's charges for interstate access as set forth in its tariff were unjust and unreasonable under Section 201(b) of the Act, that the complainant has been damaged by having to pay such rates and that it is entitled to reparations.

8. The crux of defendant's argument in both its Answer and Motion to Dismiss is that its rates for the period October 1, 1985, through December 31, 1986 were not carrier initiated rates and, therefore, the Commission lacks authority to award damages even if it determines that any particular rate or category of rates was unjust and unreasonable. Answer at 4-5; Motion to Dismiss at 11-13. Defendant adds that even assuming its rates were carrier initiated, the complainant fails to state a cause of action because Commission policy dictates that damages based on a complaint for rates found to be unjust and unreasonable may only be awarded prospectively from the date a complaint is filed. Answer at 5; Motion to Dismiss at 13-15.

9. The defendant is wrong in claiming that it canot be held liable in a complaint proceeding for alleged overearnings on its access rates because such rates are prescribed by the Commission. The Commission did not prescribe the specific rates subject to complaint in the instant proceeding, nor have these carrier-initiated rates been transformed into prescribed rates because the defendant, in developing its rates, was required to follow certain Commission rules and procedures.[5] The defendant's own filing with the Commission shows that the rates at issue generated revenues for the defendant which exceed the authorized rate of return level for the relevant study period, in this case, the 15 month period established by the formal complaint and consistent with the reporting period established in Docket 84-800.[6] This is enough to make out a *prima facie* case of a Communications Act violation and is sufficient support for a Secton 208 complaint. Finally, we have found no authority to support defendant's contention that claims for damages based on carrier-initiated rates found to be unjust and unreasonable may only be awarded prospectively from the date a complaint is filed with the Commission.

10. We cannot find in the defendant's Answer or Motion to Dismiss sufficient rationale to deny the plaintiff the relief it seeks. Although the current record arguably provides a legally adequate basis to support Commission action at this time,[7] we are providing the defendant an additional opportunity to show cause why the Commission should not order the payment of damages sought by the plaintiff.[8] The defendant also is directed to provide a calculation of such damages for each service and/or service segment as alleged in the instant complaint within twenty days of the release of this Order.[9] Thereafter, complainant is afforded ten days within which to reply to defendant's showing.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that Wisconsin Bell Inc. SHOW CAUSE within 20 days of the release of this Order why it should not remit to complainant damages due and owing as specified in complainant's complaint and pursuant to the guidelines set our herein.

12. IT IS FURTHER ORDERED that MCI Telecommunications Corporation may file comments on the Wisconsin Bell Inc. submission no later than 10 days after the filing of that submission with the Commission.

13. This Order is issued pursuant to delegated authority under 47 C.F.R. Section 0.291 and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] Several parties sought judicial review of the portion of the Commission's decision in Docket 84-800 that ordered automatic refunds of carrier earnings in excess of the prescribed return. The D.C. Circuit Court of Appeals invalidated the Commission's decision in that regard. *See American Telephone and Telegraph Co. v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) ("*AT&T v. FCC*"), *cert. denied*, _____ U.S. _____ (1989). No party challenged the rate of return prescription itself, and that prescription remains valid.

[2] *Nader v. FCC*, 520 F.2d 182, 203-04 (D.C. Cir. 1975).

[3] *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[4] *See* 47 C.F.R. § 65.701.

[5] Although the Commission's rate of return prescription protects a carrier from the possibility of liability on the grounds that earnings at the prescribed level are too high, "the Commission retains full latitude to order refunds on all other grounds." *Nader v. FCC*, 520 F.2d at 205 n.25. Moreover, while the Commission's access charge rules include many of the steps that carriers must follow in order to compute rates, these rules neither prescribe a specific revenue requirement nor "determine the legality of specific rates." *National Assoc. of Reg. Commr's v. FCC*, 737 F.2d 1095, 1120 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1224 (1985).

[6] We note that in *AT&T v. FCC*, the Court indicated that the Commission's automatic refund mechanism might have survived challenge if it had provided a means for taking into account the impact of a refund obligation on a carrier's overall return. 836 F.2d at 1390 n.4. The holding and opinion in that case are not controlling here. The court in that case did not discuss Section 208 proceedings, nor did it to purport to alter the statutory scheme of the Communications Act or limit the remedies Congress established therein. *See* para. 6, *supra*. If in response to this order to show cause, however, defendant elects to argue that the Commission should consider the impact on the defendant's overall return that would result from an award of damages in the instant proceeding, the defendant should include in its response a precise accounting of that impact.

[7] The Commission's Rules provide that formal complaints generally are resolved on a written record consisting of a complaint, answer, and reply. 47 C.F.R. § 1.720. The defendant has filed its answer and could not argue plausibly that judgment at this point in the proceeding violated its due process rights.

[8] Defendant's contention that portions of complainant's damage claims are barred by Section 415 of the Act is unavailing. The purpose of Section 415 is "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed." Bunker Ramo Corp., 31 FCC 2d 449, 453 (1971). The statute is not discretionary and the lapse of time beyond the limitation period not only bars the remedy but also destroys the liability. Armstrong Utilities, Inc. v. General Telephone Co. of Pennsylvania, 25 FCC 2d 385 (1970); cf. Midstate Co. v. Pennsylvania R. Co.,

320 U.S. 356, 363-64 (1943); Kansas City So. R. Co. v. Wolf, 201 U.S. 133 (1923). The construction of Section 415 by the Commission and the federal courts has been strict and exceptions to its application have been confined to narrow circumstances. *Id.*; *see* Thornwell Barnes Co. v. Illinois Bell, 1 FCC 2d 1247 (1967); Ward v. Northern Ohio Telephone Company, 251 F. Supp. 606, *aff'd*, 381 F.2d 16 (6th Cir. 1967). In *Bunker Ramo*, *supra*, however, the Commission's Review Board identified two basic situations in which the strict application of the statute may be altered or affected:

> First, a statute of limitations does not begin to run until discovery of the right or wrong or of the facts on which such knowledge is chargeable in law. Secondly, the running of the period of limitations may be suspended or tolled by various causes; for example, although mere ignorance will generally not toll the statute, active fraudulent concealment by a defendant will generally do so. 31 FCC 2d at 454.

The Review Board stated that "a defendant should not be permitted to interpose the statutory time limit as a defense where his conduct is the primary reason for the tardiness of the plaintiff's action." *Id.* Thus, even though Section 415 is a substantive and jurisdictional statute of limitations, the period of limitations may nevertheless be tolled in limited circumstances. Consistent with these guidelines, we conclude that the discovery of the "right or wrong" in the instant case occurred within the meaning of Section 415 when defendant filed its rate of return monitoring reports. Those reports showed that defendant had earned excessive returns on certain interstate access service categories for the relevant period. Until such time, complainant had no way of knowing that defendant's tariffed rates earned excessive returns and, therefore, no basis for a claim of damages. Under the circumstances, Section 415 poses no bar to complainant's claims.

[9] For purposes of this calculation, defendant should assume a study area defined by the geographical reach of defendant's filed tariffs and a maximum allowable rate of return of 13.1 percent overall rate of return, and a maximum allowable rate of return for any access service category of 13.25 percent. These assumptions are consistent with 47 C.F.R. § 65.701(b) and the Commission's Order in Phase I of Docket No. 84-800, *supra*. Calculations should be explained fully with evidentiary support adequate to allow the Bureau and complainant to evaluate defendant's arguments and support documentation. To the extent the defendant wishes to re-submit materials previously submitted in its Answer, it is encouraged to so so as long as the relation of such materials to defendant's arguments is clearly set out. All pleadings and information submitted thus far in addition to those submitted in response to this Order will be duly considered in making a final determination in this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS
CORPORATION,
Complainant,

v. File No. E-88-47

SOUTHWESTERN BELL
TELEPHONE COMPANY,
Defendant.

ORDER TO SHOW CAUSE

Adopted: July 26, 1989; Released: July 27, 1989

By the Deputy Chief, Common Carrier Bureau:

1. Pursuant to this Order, issued in the above-referenced formal complaint proceeding, we direct Southwestern Bell Telephone Company ("defendant") to show cause why it should not pay certain damages, to be determined in conformity with this Order, to MCI Telecommunications Corporation ("complainant").

I. BACKGROUND

2. The instant complaint was filed on February 9, 1988. Complainant alleges that defendant's rates for interstate access services for the period October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 201(b). Complainant's allegations derive from its assertions that filings made with the Commission by the defendant for the 15 month period at issue establish that the defendant earned returns in the interstate special and switched traffic sensitive access service categories which are in excess of the lawful rate of return prescribed by the Commission in CC Docket No. 84-800. *See Authorized Rates of Return for the Interstate Service of AT&T Communications and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, FCC 85-527.[1] Complaint, at 3. Complainant seeks damages in an amount equal to the difference between interstate access service rates it actually paid during the relevant time period and the amount it would have paid if the defendant's charges had earned within the zone of reasonableness established by the Commission in Phase I of its Docket No. 84-800 rate of return proceeding, plus accumulated interest. Complaint, at 4.

3. In its Answer, defendant denies that complainant has stated a valid cause of action pursuant to Sections 206-209 of the Act, alleges various procedural irregularities in connection with the complaint, disputes the propriety of Commission-ordered relief and claims that portions of the damages claim are, in any event, barred by the limitations provisions of 47 U.S.C. § 415. Answer, at 2-3. Additionally, defendant filed a Motion to Dismiss on March 31, 1988 which complainant has opposed. We deny the Motion to Dismiss to the extent we conclude that complainant has established a *prima facie* case that defendant's tariffed interstate access rates produced revenues unlawfully in excess of the Commission's rate of return prescription and order the defendant to show cause why it should not pay damages. We defer ruling on all other issues raised in defendant's Motion to Dismiss.

II. DISCUSSION

4. Based on the record before us, we conclude that the complainant has made a *prima facie* case of a violation of the Communications Act for which damages may lie. Accordingly, the defendant is ordered to show cause why damages should not be remitted to the plaintiff in the amount of the difference between the rates it paid and those rates that would have secured for the defendant a level of earnings no greater than those authorized.

5. Under the Communications Act, the Commission regulates the rates carriers may charge for interstate telecommunications services. 47 U.S.C. §§ 201-205. As part of that process, the Commission sets the rate of return on capital that carriers use in connection with the recovery of that portion of their costs apportioned to the interstate jurisdiction.[2] The Commission also has prescribed for all local exchange carriers (LECs), including the defendant, a methodology commonly known as the "access charge system," which carriers are required to follow in tariffing interstate services. This methodology determines, *inter alia*, the carriers' rate structure and the allocation of costs within that structure.[3] For the time period at issue in the instant complaint, from October 1, 1985, through December 31, 1986, carriers were required to target their interstate access rates to earn a 12.75 percent return on their capital. Carriers also were notified by the Commission that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate access earnings during this period and 13.25 percent would be the maximum allowable rate of return on any access service categories.[4]

6. The Act also provides that "any person" may petition the Commission in complaint of "anything done or omitted to be done" by a common carrier in contravention of the Act, that carriers shall be liable "for the full amount of damages sustained in consequence of any such violation," and that the Commission shall order the payment of damages in reparation of such violation(s). 47 U.S.C. §§ 206, 208-209.

7. The complainant alleges that it has been damaged because it has paid to the defendant charges for interstate access that yielded rates of return that exceeded the Commission's prescribed rate of return. In support of its complaint, the complainant points to a rate of return monitoring report filed with this Commission by defendant which shows that for the period October 1, 1985 through December 31, 1986, defendant earned returns in the special access category of 15.43 percent in the State of Missouri and 15.99 percent in Oklahoma. Complainant contends that the monitoring reports also show that defendant earned returns in the switched traffic sensitive category of 14.21 percent in the state of Arkansas, 16.21 percent in Kansas and 14.93 percent in Missouri. Complainant states that because defendant's rates of return exceeded the rate prescribed by the Commission, defen-

dant's charges for interstate access as set forth in its tariffs were unjust and unreasonable under Section 201(b) of the Act, that the complainant has been damaged by having to pay such rates and that it is entitled to reparations.

8. The crux of defendant's argument in both its Answer and Motion to Dismiss is that the instant complaint cannot lie given the ruling of the court striking down the automatic refund mechanism. Answer, at 3-4; Motion to Dismiss, at 2. Defendant claims, in effect, that complainant's request for damages is nothing but a disguised request that the Commission order the automatic refund the court found unlawful.

9. Defendant's reliance on *AT&T v. FCC* in its Answer and in support of its Motion to Dismiss is unfounded. The Court in that case did not discuss Section 208 proceedings, nor did it purport to alter the statutory scheme of the Communications Act or limit the remedies Congress established therein. Moreover, the Court previously has recognized that the Commission has the power to prescribe an authorized rate of return. The defendant's own filing with the Commission shows that the rates at issue generated revenues for the defendant which exceed authorized rate of return levels for the relevant study period, in this case, the 15 month period established by the formal complaint and consistent with the reporting period established in Docket 84-800.[5] This is enough to make out a *prima facie* case of a Communication's Act violation and is sufficient support for a Section 208 complaint.

10. We cannot find in the defendant's answer or Motion to Dismiss sufficient rationale to deny the plaintiff the relief it seeks. Although the current record arguably provides a legally adequate basis to support Commission action at this time,[6] we are providing the defendant an additional opportunity to show cause why the Commission should not order the payment of damages sought by the complainant.[7] The defendant also is directed to provide a calculation of such damages for each service and/or service segment as alleged in the instant complaint within twenty days of the release of this Order.[8] Thereafter, complainant is afforded ten days within which to reply to defendant's showing.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that Southwestern Bell Telephone Company SHOW CAUSE within 20 days of the release date of this Order why it should not remit to complainant damages due and owing as specified in complainant's complaint and pursuant to the guidelines set out herein.

12. IT IS FURTHER ORDERED that MCI Telecommunications Corporation may file comments on the Southwestern Bell Telephone Company submission no later than 10 days after the filing of that submission with the Commission.

13. This Order is issued pursuant to delegated authority under 47 C.F.R. Section 0.291 and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] Several parties sought judicial review of the portion of the Commission's decision in Docket 84-800 that ordered automatic refunds of carrier earnings in excess of the prescribed return. The D.C. Circuit Court of Appeals invalidated the Commission's decision in that regard. *See American Telephone and Telegraph Co. v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) ("*AT&T v. FCC*"), *cert. denied*, _____ U.S. _____ (1989). No party challenged the rate of return prescription itself, and that prescription remains valid.

[2] *Nader v. FCC*, 520 F.2d 182, 203-04 (D.C. Cir. 1975).

[3] *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[4] *See* 47 C.F.R. § 65.701.

[5] We note that in *AT&T v. FCC*, the Court indicated that the Commission's automatic refund mechanism might have survived challenge if it had provided a means for taking into account the impact of a refund obligation on a carrier's overall rate of return. 836 F.2d at 1390 n.4. As noted previously, the holding and opinion in that case are not controlling here. If in response to this order to show cause, however, defendant elects to argue that the Commission should consider the impact on the defendant's overall return that would result from an award of damages in the instant proceeding, the defendant should include in its response a precise accounting of that impact.

[6] The Commission's Rules provide that formal complaints generally are resolved on a written record consisting of a complaint, answer, and reply. 47 C.F.R. § 1.720. The defendant has filed its answer and could not argue plausibly that judgment at this point in the proceeding violated its due process rights.

[7] Defendant's contention that portions of complainant's damage claims are barred by Section 415 of the Act is unavailing. The purpose of Section 415 is "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed." Bunker Ramo Corp., 31 FCC 2d 449, 453 (1971). The statute is not discretionary and the lapse of time beyond the limitation period not only bars the remedy but also destroys the liability. Armstrong Utilities, Inc. v. General Telephone Co. of Pennsylvania, 25 FCC 2d 385 (1970); cf. Midstate Co. v. Pennsylvania R. Co., 320 U.S. 356, 363-64 (1943); Kansas City So. R. Co. v. Wolf, 201 U.S. 133 (1923). The construction of Section 415 by the Commission and the federal courts has been strict and exceptions to its application have been confined to narrow circumstances. *Id.*; *see* Thornwell Barnes Co. v. Illinois Bell, 1 FCC 2d 1247 (1967); Ward v. Northern Ohio Telephone Company, 251 F. Supp. 606, *aff'd*, 381 F.2d 16 (6th Cir. 1967). In *Bunker Ramo*, *supra*, however, the Commission's Review Board identified two basic situations in which the strict application of the statute may be altered or affected:

> First, a statute of limitations does not begin to run until discovery of the right or wrong or of the facts on which such knowledge is chargeable in law. Secondly, the run-

> ning of the period of limitations may be suspended or tolled by various causes; for example, although mere ignorance will generally not toll the statute, active fraudulent concealment by a defendant will generally do so. 31 FCC 2d at 454.

The Review Board stated that "a defendant should not be permitted to interpose the statutory time limit as a defense where his conduct is the primary reason for the tardiness of the plaintiff's action. *Id.* Thus, even though Section 415, is a substantive and jurisdictional statute of limitations, the period of limitations may nevertheless be tolled in limited circumstances. Consistent with these guidelines, we conclude that the discovery of the "right or wrong" in the instant case occurred within the meaning of Section 415 when defendant filed its rate of return monitoring reports. Those reports showed that defendant had earned excessive returns on certain interstate access service categories for the relevant period. Until such time, complainant had no way of knowing that defendant's tariffed rates earned excessive returns and, therefore, no basis for a claim of damages. Under the circumstances, Section 415 poses no bar to complainant's claims.

[8] For purposes of this calculation, defendant should assume a study area defined by the geographical reach of defendant's filed tariffs, a maximum allowable rate of return of 13.1 percent per overall interstate earnings, and a maximum allowable rate of return for any access service category of 13.25 percent. These assumptions are consistent with 47 C.F.R. § 65.701(b) and the Commission's Order in Phase I of Docket No. 84-800, *supra*. Calculations should be explained fully with evidentiary support adequate to allow the Bureau and complainant to evaluate defendant's arguments and support documentation. To the extent defendant wishes to re-submit materials previously submitted in its Answer, defendant is encouraged to do so as long as the relation of such materials to defendant's arguments is clearly set out. All pleading and information submitted thus far, in addition to those submitted in response to this Order, will be duly considered in making a final determination in this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION,
Complainant,

v. File No. E-88-46

PACIFIC BELL TELEPHONE COMPANY,
Defendant.

ORDER TO SHOW CAUSE

Adopted: July 26, 1989; Released: July 27, 1989

By the Deputy Chief, Common Carrier Bureau:

1. Pursuant to this Order, issued in the above-referenced formal complaint proceeding, we direct Pacific Bell Telephone Company ("defendant") to show cause why it should not pay certain damages, to be determined in conformity with this Order, to MCI Telecommunications Corporation ("complainant").

I. BACKGROUND

2. The instant complaint was filed on February 9, 1988. Complainant alleges that defendant's rates for interstate access services for the period October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 201(b). Complainant's allegations derive from its assertions that filings made with the Commission by the defendant for the 15 month period at issue establish that the defendant earned a return in the switched traffic sensitive access category of 14.24 percent which is in excess of the lawful rate of return prescribed by the Commission in CC Docket No. 84-800. *See Authorized Rates of Return for the Interstate Service of AT&T Communications and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, FCC 85-527.[1] Complaint, at 3. Complainant seeks damages in an amount equal to the difference between interstate access service rates it actually paid during the relevant time period and the amount it would have paid if the defendant's charges had earned within the zone of reasonableness established by the Commission in Phase I of its Docket No. 84-800 rate of return proceeding, plus accumulated interest. Complaint, at 4.

3. In its Answer, defendant denies that complainant has stated a valid cause of action pursuant to Sections 206-209 of the Act, alleges various procedural irregularities in connection with the complaint, disputes the propriety of Commission-ordered relief and claims that portions of the damages claim are, in any event, barred by the limitations provisions of 47 U.S.C. § 415. Answer, at 3-10. Additionally, defendant filed a Motion to Dismiss on March 31, 1988 which complainant has opposed. We deny the Motion to Dismiss to the extent we conclude that complainant has established a *prima facie* case that defendant's tariffed interstate access rates produced revenues unlawfully in excess of the Commission's rate of return prescription and order the defendant to show cause why it should not pay damages. We defer ruling on any other issues raised in defendant's Motion to Dismiss.

II. DISCUSSION

4. Based on the record before us, we conclude that the complainant has made a *prima facie* case of a violation of the Communications Act for which damages may lie. Accordingly, the defendant is ordered to show cause why damages should not be remitted to the plaintiff in the amount of the difference between the rates it paid and those rates that would have secured for the defendant a level of earnings no greater than those authorized.

5. Under the Communications Act, the Commission regulates the rates carriers may charge for interstate telecommunications services. 47 U.S.C. §§ 201-205. As part of that process, the Commission sets the rate of return on capital that carriers use in connection with the recovery of that portion of their costs apportioned to the interstate jurisdiction.[2] The Commission also has prescribed for all local exchange carriers (LECs), including the defendant, a methodology commonly known as the "access charge system," which carriers are required to follow in tariffing interstate services. This methodology determines, *inter alia*, the carriers' rate structure and the allocation of costs within that structure.[3] For the time period at issue in the instant complaint, from October 1, 1985, through December 31, 1986, carriers were required to target their interstate access rates to earn a 12.75 percent return on their capital. Carriers also were notified by the Commission that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate access earnings during this period and 13.25 percent would be the maximum allowable rate of return for any access service category.[4]

6. The Act also provides that "any person" may petition the Commission in complaint of "anything done or omitted to be done" by a common carrier in contravention of the Act, that carriers shall be liable "for the full amount of damages sustained in consequence of any such violation," and that the Commission shall order the payment of damages in reparation of such violation(s). 47 U.S.C. §§ 206, 208-209.

7. The complainant alleges that it has been damaged because it has paid to the defendant charges for interstate access that yielded rates of return that exceeded the Commission's prescribed rate of return. In support of its complaint, the complainant points to a rate of return monitoring report filed with this Commission by defendant which shows that for the period October 1, 1985 through December 31, 1986, defendant earned a return of 14.24 percent[5] in the switched traffic sensitive category. Complainant states that because defendant's rates of return exceeded the rate prescribed by the Commission, defendant's charges for interstate access as set forth in its tariffs were unjust and unreasonable under Section 201(b) of the Act, that the complainant has been damaged by having to pay such rates, and that it is entitled to reparations.

8. The crux of defendant's argument in both its Answer and Motion to Dismiss is that the instant complaint cannot lie because the Commission's decision in Docket 84-800 did not establish a private cause of action that would permit individual remedy. Answer, at 3-8; Motion to Dismiss, at 2. Defendant further states that should the Commission determine that complainant's complaint does lie, the amount of damages should be limited to the excess of the aggregate amount complainant actually paid to defendant for all interstate access services for the relevant period, plus interest, and the amount complainant would have paid had defendant's return not exceeded the authorized rate of return. Answer at 10-12.

9. The defendant is wrong in claiming that relief is barred because the Commission's decisions in Docket 84-800 did not establish a private cause of action that would permit individual remedy. As stated above, the private cause of action is created by the Communications Act which provides that "any person" may seek reparation for any injury alleged to have been caused by a common carrier.[6] The defendant's own filing with the Commission shows that the rates at issue generated revenues for the defendant which exceed the authorized rate of return level for the relevant study period, in this case, the 15 month period established by the formal complaint and consistent with the reporting period established in Docket 84-800.[7] This is enough to make out a *prima facie* case of a Communication's Act violation and is sufficient support for a Section 208 complaint.

10. We cannot find in the defendant's answer or Motion to Dismiss sufficient rationale to deny the complainant the relief it seeks. Although the current record arguably provides a legally adequate basis to support Commission action at this time,[8] we are providing the defendant an additional opportunity to show cause why the Commission should not order the payment of damages sought by the plaintiff.[9] The defendant also is directed to provide a calculation of such damages for each service and/or service segment as alleged in the instant complaint within twenty days of the release of this Order.[10] Thereafter, complainant is afforded ten days within which to reply to defendant's showing.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that Pacific Bell Telephone Company SHOW CAUSE within 20 days of the release date of this Order why it should not remit to complainant damages due and owing as specified in complainant's complaint and pursuant to the guidelines set out herein.

12. IT IS FURTHER ORDERED that MCI Telecommunications Corporation may file comments on the Pacific Bell Telephone Company submission no later than 10 days after the filing of that submission with the Commission.

13. This Order is issued pursuant to delegated authority under 47 C.F.R. Section 0.291 and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] Several parties sought judicial review of the portion of the Commission's decision in Docket 84-800 that ordered automatic refunds of carrier earnings in excess of the prescribed return. The D.C. Circuit Court of Appeals invalidated the Commission's decision in that regard. *See American Telephone and Telegraph Co. v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) ("*AT&T v. FCC*"), *cert. denied*, _____ U.S. _____ (1989). No party challenged the rate of return prescription itself, and that prescription remains valid.

[2] *Nader v. FCC*, 520 F.2d 182, 203-04 (D.C. Cir. 1975).

[3] *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[4] *See* 47 C.F.R. § 65.701.

[5] We note that our review of defendant's rate of return monitoring reports indicates that the defendant's earned rate of return on the subject category was actually 14.51 percent. In its answer, defendant concedes that 14.51 percent is the correct rate of return figure. Answer at 3-4.

[6] *See supra*, para. 6. Although it is not clear from its pleadings, defendant's argument may be that the subject complaint cannot lie given the ruling of the court in *AT&T v. FCC* striking down the automatic refund mechanism. In any event, we need not address that issue here given our conclusion that complainant has established a *prima facie* case of a Communications Act violation. We simply note that any such reliance on *AT&T v. FCC* is misplaced. The court in that case did not discuss Section 208 proceedings, nor did it purport to alter the statutory scheme of the Communications Act or limit the remedies Congress established therein.

[7] We note that in *AT&T v. FCC*, the Court indicated that the Commission's automatic refund mechanism might have survived challenge if it had provided a means for taking into account the impact of a refund obligation on a carrier's overall rate of return. 836 F.2d at 1390 n.4. As noted previously, the holding and opinion in that case are not controlling here. If in response to this order to show cause, however, defendant elects to argue that the Commission should consider the impact on the defendant's overall return that would result from an award of damages in the instant proceeding, the defendant should include in its response a precise accounting of that impact.

[8] The Commission's Rules provide that formal complaints generally are resolved on a written record consisting of a complaint, answer, and reply. 47 C.F.R. § 1.720. The defendant has filed its answer and could not argue plausibly that judgment at this point in the proceeding violated its due process rights.

[9] Defendant's contention that portions of complainant's damage claims are barred by Section 415 of the Act is unavailing. The purpose of Section 415 is "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed." Bunker Ramo Corp., 31 FCC 2d 449, 453 (1971). The statute is not discretionary and the lapse of time beyond the limitation period not only bars the remedy but also destroys the liability. Arm-

strong Utilities, Inc. v. General Telephone Co. of Pennsylvania, 25 FCC 2d 385 (1970); cf. Midstate Co. v. Pennsylvania R. Co., 320 U.S. 356, 363-64 (1943); Kansas City So. R. Co. v. Wolf, 201 U.S. 133 (1923). The construction of Section 415 by the Commission and the federal courts has been strict and exceptions to its application have been confined to narrow circumstances. *Id.* ; *see* Thornwell Barnes Co. v. Illinois Bell, 1 FCC 2d 1247 (1967); Ward v. Northern Ohio Telephone Company, 251 F. Supp. 606, *aff'd*, 381 F.2d 16 (6th Cir. 1967). In *Bunker Ramo*, *supra*, however, the Commission's Review Board identified two basic situations in which the strict application of the statute may be altered or affected:

> First, a statute of limitations does not begin to run until discovery of the right or wrong or of the facts on which such knowledge is chargeable in law. Secondly, the running of the period of limitations may be suspended or tolled by various causes; for example, although mere ignorance will generally not toll the statute, active fraudulent concealment by a defendant will generally do so. 31 FCC 2d at 454.

The Review Board stated that "a defendant should not be permitted to interpose the statutory time limit as a defense where his conduct is the primary reason for the tardiness of the plaintiff's action." *Id.* Thus, even though Section 415 is a substantive and jurisdictional statute of limitations, the period of limitations may nevertheless be tolled in limited circumstances. Consistent with these guidelines, we conclude that the discovery of the "right or wrong" in the instant case occurred within the meaning of Section 415 when defendant filed its rate of return monitoring reports. Those reports showed that defendant had earned excessive returns on certain interstate access service categories for the relevant period. Until such time, complainant had no way of knowing that defendant's tariffed rates earned excessive returns and, therefore, no basis for a claim of damages. Under the circumstances, Section 415 poses no bar to complainant's claims.

[10] For purposes of this calculation, defendant should assume a study area defined by the geographical reach of defendant's filed tariffs, a maximum allowable rate of return of 13.1 percent per overall interstate earnings, and a maximum allowable rate of return for any access service category of 13.25 percent. These assumptions are consistent with 47 C.F.R. § 65.701(b) and the Commission's Order in Phase I of Docket No. 84-800, *supra*. Calculations should be explained fully with evidentiary support adequate to allow the Bureau and complainant to evaluate defendant's arguments and support documentation. To the extent defendant wishes to re-submit materials previously submitted in its Answer, defendant is encouraged to do so as long as the relation of such materials to defendant's arguments is clearly set out. All pleadings and information submitted thus far, in addition to those submitted in response to this Order, will be duly considered in making a final determination in this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS
CORPORATION,
Complainant,

v. File No. E-88-44

PACIFIC NORTHWEST BELL
TELEPHONE COMPANY,
Defendant.

ORDER TO SHOW CAUSE

Adopted: July 26, 1989; Released: July 27, 1989

By the Deputy Chief, Common Carrier Bureau:

1. Pursuant to this Order, issued in the above-referenced formal complaint proceeding, we direct Pacific Northwest Bell Telephone Company ("defendant") to show cause why it should not pay certain damages, to be determined in conformity with this Order, to MCI Telecommunications Corporation ("complainant").

I. BACKGROUND

2. The instant complaint was filed on February 9, 1988. Complainant alleges that defendant's rates for interstate access services for the period October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 201(b). Complainant's allegations derive from its assertions that filings made with the Commission by the defendant for the 15 month period at issue establish that the defendant earned returns in the interstate special and switched traffic sensitive access categories which is in excess of the lawful rate of return prescribed by the Commission in CC Docket No. 84-800. *See Authorized Rates of Return for the Interstate Service of AT&T Communications and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, FCC 85-527.[1] Complaint, at 3. Complainant seeks damages in an amount equal to the difference between interstate access service rates it actually paid during the relevant time period and the amount it would have paid if the defendant's charges had earned within the zone of reasonableness established by the Commission in Phase I of its Docket No. 84-800 rate of return proceeding, plus accumulated interest. Complaint, at 4.

3. In its Answer,[2] defendant denies that complainant has stated a valid cause of action pursuant to Sections 206-209 of the Act, alleges various procedural irregularities in connection with the complaint, disputes the propriety of Commission-ordered relief and claims that portions of the damages claim are, in any event, barred by the limitations provisions of 47 U.S.C. § 415. Answer, at 4-8. Additionally, defendant filed a Motion to Dismiss on March 31, 1988 which complainant has opposed. We deny the Motion to Dismiss to the extent we conclude that complainant has established a *prima facie* case that defendant's tariffed interstate access rates produced revenues unlawfully in excess of the Commission's rate of return prescription and order the defendant to show cause why it should not pay damages. We defer ruling on any other issues raised in defendant's Motion to Dismiss.

II. DISCUSSION

4. Based on the record before us, we conclude that the complainant has made a *prima facie* case of a violation of the Communications Act for which damages may lie. Accordingly, the defendant is ordered to show cause why damages should not be remitted to the plaintiff in the amount of the difference between the rates it paid and those rates that would have secured for the defendant a level of earnings no greater than those authorized.

5. Under the Communications Act, the Commission regulates the rates carriers may charge for interstate telecommunications services. 47 U.S.C. §§ 201-205. As part of that process, the Commission sets the rate of return on capital that carriers use in connection with the recovery of that portion of their costs apportioned to the interstate jurisdiction.[3] The Commission also has prescribed for all local exchange carriers (LECs), including the defendant, a methodology commonly known as the "access charge system," which carriers are required to follow in tariffing interstate services. This methodology determines, *inter alia*, the carriers' rate structure and the allocation of costs within that structure.[4] For the time period at issue in the instant complaint, from October 1, 1985, through December 31, 1986, carriers were required to target their interstate access rates to earn a 12.75 percent return on their capital. Carriers also were notified by the Commission that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate access earnings during this period and 13.25 percent would be the maximum allowable rate of return for any access service category.[5]

6. The Act also provides that "any person" may petition the Commission in complaint of "anything done or omitted to be done" by a common carrier in contravention of the Act, that carriers shall be liable "for the full amount of damages sustained in consequence of any such violation," and that the Commission shall order the payment of damages in reparation of such violation(s). 47 U.S.C. §§ 206, 208-209.

7. The complainant alleges that it has been damaged because it has paid to the defendant charges for interstate access that yielded rates of return that exceeded the Commission's prescribed rate of return. In support of its complaint, the complainant points to a rate of return monitoring report filed with this Commission by defendant which shows that for the period October 1, 1985 through December 31, 1986, defendant earned returns in the special access category of 15.09 percent in the State of Idaho. Complainant contends that the monitoring reports also show that defendant earned returns in the switched traffic sensitive category of 14.76 percent in Oregon. Complainant states that because defendant's rates of return exceeded the rate prescribed by the Commission, defendant's charges for interstate access as set forth in its

tariffs were unjust and unreasonable under Section 201(b) of the Act, that the complainant has been damaged by having to pay such rates, and that it is entitled to reparations.

8. The crux of defendant's argument in both its Answer and Motion to Dismiss is that the instant complaint cannot lie given the ruling of the court striking down the automatic refund mechanism. Answer, at 6; Motion to Dismiss at 3-4. The defendant claims, in effect, that complainant's request for damages is nothing but a disguised request that the Commission order the automatic refund the court found unlawful.

9. Defendant's reliance on *AT&T v. FCC* in its Answer and in support of its Motion to Dismiss is unfounded. The Court in that case did not discuss Section 208 proceedings, nor did it purport to alter the statutory scheme of the Communications Act or limit the remedies Congress established therein. Moreover, the Court previously has recognized that the Commission has the power to prescribe an authorized rate of return. The defendant's own filing with the Commission shows that the rates at issue generated revenues for the defendant which exceed authorized rate of return levels for the relevant study period, in this case, the 15 month period established by the formal complaint and consistent with the reporting period established in Docket 84-800.[6] This is enough to make out a *prima facie* case of a Communication's Act violation and is sufficient support for a Section 208 complaint.

10. We cannot find in the defendant's answer or Motion to Dismiss sufficient rationale to deny the complainant the relief it seeks. Although the current record arguably provides a legally adequate basis to support Commission action at this time,[7] we are providing the defendant an additional opportunity to show cause why the Commission should not order the payment of damages sought by the complainant.[8] The defendant also is directed to provide a calculation of such damages for each service and/or service segment as alleged in the instant complaint within twenty days of the release of this Order.[9] Thereafter, complainant is afforded ten days within which to reply to defendant's showing.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that Pacific Northwest Bell Telephone Company SHOW CAUSE within 20 days of the release date of this Order why it should not remit to complainant damages due and owing as specified in complainant's complaint and pursuant to the guidelines set out herein.

12. IT IS FURTHER ORDERED that MCI Telecommunications Corporation may file comments on the Pacific Northwest Bell Telephone Company submission no later than 10 days after the filing of that submission with the Commission.

13. This Order is issued pursuant to delegated authority under 47 C.F.R. Section 0.291 and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] Several parties sought judicial review of the portion of the Commission's decision in Docket 84-800 that ordered automatic refunds of carrier earnings in excess of the prescribed return. The D.C. Circuit Court of Appeals invalidated the Commission's decision in that regard. *See American Telephone and Telegraph Co. v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) ("*AT&T v. FCC*"), *cert. denied*, _____ U.S. _____ (1989). No party challenged the rate of return prescription itself, and that prescription remains valid.

[2] We note that MCI filed companion complaints against the three US West, Inc. companies including the defendant Pacific Northwest Bell, Mountain States Telephone and Telegraph Co. and Northwestern Bell Telephone Co. The defendants collectively filed a Joint Answer and Joint Motion to Dismiss MCI's complaints. In the interest of clear and unambiguous disposition of these matters, we will treat the Joint Answer and Joint Motion to Dismiss on an individual defendant basis in each complaint proceeding.

[3] *Nader v. FCC*, 520 F.2d 182, 203-04 (D.C. Cir. 1975).

[4] *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[5] *See* 47 C.F.R. § 65.701.

[6] We note that in *AT&T v. FCC*, the Court indicated that the Commission's automatic refund mechanism might have survived challenge if it had provided a means for taking into account the impact of a refund obligation on a carrier's overall rate of return. 836 F.2d at 1390 n.4. As noted previously, the holding and opinion in that case are not controlling here. If in response to this order to show cause, however, defendant elects to argue that the Commission should consider the impact on the defendant's overall return that would result from an award of damages in the instant proceeding, the defendant should include in its response a precise accounting of that impact.

[7] The Commission's Rules provide that formal complaints generally are resolved on a written record consisting of a complaint, answer, and reply. 47 C.F.R. § 1.720. The defendant has filed its answer and could not argue plausibly that judgment at this point in the proceeding violated its due process rights.

[8] Defendant's contention that portions of complainant's damage claims are barred by Section 415 of the Act is unavailing. The purpose of Section 415 is "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed." Bunker Ramo Corp., 31 FCC 2d 449, 453 (1971). The statute is not discretionary and the lapse of time beyond the limitation period not only bars the remedy but also destroys the liability. Armstrong Utilities, Inc. v. General Telephone Co. of Pennsylvania, 25 FCC 2d 385 (1970); cf. Midstate Co. v. Pennsylvania R. Co., 320 U.S. 356, 363-64 (1943); Kansas City So. R. Co. v. Wolf, 201 U.S. 133 (1923). The construction of Section 415 by the Commission and the federal courts has been strict and exceptions to its application have been confined to narrow circumstances. *Id.*; *see* Thornwell Barnes Co. v. Illinois Bell, 1 FCC 2d 1247 (1957);

Ward v. Northern Ohio Telephone Company, 251 F. Supp. 606, *aff'd*, 381 F.2d 16 (6th Cir. 1967). In *Bunker Ramo*, *supra*, however, the Commission's Review Board identified two basic situations in which the strict application of the statute may be altered or affected:

> First, a statute of limitations does not begin to run until discovery of the right or wrong or of the facts on which such knowledge is chargeable in law. Secondly, the running of the period of limitations may be suspended or tolled by various causes; for example, although mere ignorance will generally not toll the statute, active fraudulent concealment by a defendant will generally do so. 31 FCC 2d at 454.

The Review Board stated that "a defendant should not be permitted to interpose the statutory time limit as a defense where his conduct is the primary reason for the tardiness of the plaintiff's action." *Id.* Thus, even though Section 415 is a substantive and jurisdictional statute of limitations, the period of limitations may nevertheless be tolled in limited circumstances. Consistent with these guidelines, we conclude that the discovery of the "right or wrong" in the instant case occurred within the meaning of Section 415 when defendant filed its rate of return monitoring reports. Those reports showed that defendant had earned excessive returns on certain interstate access service categories for the relevant period. Until such time, complainant had no way of knowing that defendant's tariffed rates earned excessive returns and, therefore, no basis for a claim of damages. Under the circumstances, Section 415 poses no bar to complainant's claims.

[9] For purposes of this calculation, defendant should assume a study area defined by the geographical reach of defendant's filed tariffs, a maximum allowable rate of return of 13.1 percent per overall interstate earnings, and a maximum allowable rate of return for any access service category of 13.25 percent. These assumptions are consistent with 47 C.F.R. § 65.701(b) and the Commission's Order in Phase I of Docket No. 84-800, *supra*. Calculations should be explained fully with evidentiary support adequate to allow the Bureau and complainant to evaluate defendant's arguments and support documentation. To the extent defendant wishes to re-submit materials previously submitted in its Answer, defendant is encouraged to do so as long as the relation of such materials to defendant's arguments is clearly set out. All pleadings and information submitted thus far, in addition to those submitted in response to this Order, will be duly considered in making a final determination in this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-88-21

NORTHWESTERN BELL
TELEPHONE COMPANY,
Defendant.

ORDER TO SHOW CAUSE

Adopted: July 26, 1989; Released: July 27, 1989

By the Deputy Chief, Common Carrier Bureau:

1. Pursuant to this Order, issued in the above-referenced formal complaint proceeding, we direct Northwestern Bell Telephone Company ("defendant") to show cause why it should not pay certain damages, to be determined in conformity with this Order, to AT&T Communications ("complainant").

I. BACKGROUND

2. The instant complaint was filed on September 30, 1987 and amended on April 28, 1988. Complainant alleges that defendant's rates for interstate access services for the period October 1, 1985 through December 31, 1986 were unjust and unreasonable in violation of Section 201(b) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 201(b). Complainant's allegations derive from its assertions that filings made with the Commission by the defendant for the 15 month period at issue establish that defendant's overall earned rate of return on interstate access services was 13.48 percent and, therefore, in excess of the lawful rate of return prescribed by the Commission in CC Docket No. 84-800. *See Authorized Rates of Return for the Interstate Service of AT&T Communications and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, FCC 85-527.[1] Amended Complaint, at 4. Complainant seeks damages in an amount equal to the difference between interstate access service rates paid and rates which would have earned no more than the maximum allowable rate of return, plus interest on this amount from January 1, 1987, at the rate specified by the Commission in Phase I of its Docket No. 84-800 rate of return proceeding. Amended Complaint, at 5.

3. In its Answer, defendant denies that complainant has stated a valid cause of action pursuant to Sections 206-209 of the Act, alleges various procedural irregularities in connection with the complaint, disputes the propriety of Commission-ordered relief and claims that portions of the damages claim are, in any event, barred by the limitations provisions of 47 U.S.C. § 415. Answer, at 4-12. Additionally, defendant filed a Motion to Dismiss Amended Complaint on May 31, 1988 which complainant has opposed. We deny the Motion to Dismiss to the extent we conclude that complainant has established a *prima facie* case that tariffed interstate access rates produced revenues unlawfully in excess of the Commission's rate of return prescription and order the defendant to show cause why it should not pay damages. We defer ruling on all other issues raised in defendant's Motion to Dismiss.

II. DISCUSSION

4. Based on the record before us, we conclude that the complainant has made out a *prima facie* case of a violation of the Communications Act for which damages may lie. Accordingly, the defendant is ordered to show cause why damages should not be remitted to the plaintiff in the amount of the difference between the rates it paid and those rates that would have secured for the defendant a level of earnings no greater than authorized.

5. Under the Communications Act, the Commission regulates the rates carriers may charge for interstate telecommunications services. 47 U.S.C. §§ 201-205. As part of that process, the Commission sets the rate of return on capital that carriers use in connection with the recovery of that portion of their costs apportioned to the interstate jurisdiction.[2] The Commission also has prescribed for all local exchange carriers (LECs), including the defendant, a methodology commonly known as the "access charge system," which carriers are required to follow in tariffing interstate services. This methodology determines, *inter alia*, the carriers' rate structure and the allocation of costs within that structure.[3] For the time period at issue in the instant complaint, from October 1, 1985, through December 31, 1986, carriers were required to target their interstate access rates to earn a 12.75 percent return on their capital. Carriers also were notified by the Commission that a 13.10 percent level of earnings would be the maximum allowable rate of return on overall interstate access earnings during this period and 13.25 percent would be the maximum allowable rate of return on individual access service categories.[4]

6. The Act also provides that "any person" may petition the Commission in complaint of "anything done or omitted to be done" by a common carrier in contravention of the Act, that carriers shall be liable "for the full amount of damages sustained in consequence of any such violation," and that the Commission shall order the payment of damages in reparation of such violation(s). 47 U.S.C. §§ 206, 208-209.

7. The complainant alleges that it has been damaged because it has paid to the defendant charges that earned in excess of its authorized return for overall interstate access. In support of its complaint, the complainant points to a rate of return monitoring report filed with this Commission by defendant which shows that defendant earned a return of 13.48 percent on interstate access for the period October 1, 1985, through December 31, 1986. Complainant states that earnings at this level exceed the maximum level of overall interstate access earnings authorized by the Commission, that the rates used to recover this level of earnings were, therefore, unjust and unreasonable under Section 201(b) of the Act, that the complainant has been damaged by having to pay such rates and that it is entitled to reparations.

8. The crux of defendant's argument in both its Answer and Motion to Dismiss is that the instant complaint cannot lie given the ruling of the court striking down the

automatic refund mechanism. Answer, at 6-7. According to the defendant, complainant's request for damages is nothing but a disguised request that the Commission order the automatic refund the court found unlawful.

9. Defendant's reliance on *AT&T v. FCC* in its Answer and in support of its Motion to Dismiss is unfounded. The Court in that case did not discuss Section 208 proceedings, nor did it purport to alter the statutory scheme of the Communications Act or limit the remedies Congress established therein. Moreover, the Court previously has recognized that the Commission has the power to prescribe an authorized rate of return. The defendant's own filing with the Commission shows that the rates at issue generated revenues for the defendant which exceed the authorized rate of return level for the relevant study period, in this case, the 15 month period established by the formal complaint and consistent with the reporting period established in Docket 84-800.[5] This is enough to make out a *prima facie* case of a Communication's Act violation and is sufficient support for a Section 208 complaint.

10. We cannot find in the defendant's Answer or Motion to Dismiss sufficient rationale to deny the plaintiff the relief it seeks. Although the current record arguably provides a legally adequate basis to support Commission action at this time,[6] we are providing the defendant an additional opportunity to show cause why the Commission should not order the payment of damages sought by the plaintiff.[7] The defendant also is directed to provide a calculation of such damages for each service and/or service segment as alleged in the instant complaint within twenty days of the release of this Order.[8] Thereafter, complainant is afforded ten days within which to reply to defendant's showing.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that Northwestern Bell Telephone Company SHOW CAUSE within 20 days of the release date of this Order why it should not remit to complainant damages due and owing as specified in complainant's complaint and pursuant to the guidelines set out herein.

12. IT IS FURTHER ORDERED that AT&T Communications may file comments on the Northwestern Bell Telephone Company submission no later than 10 days after the filing of that submission with the Commission.

13. This Order is issued pursuant to delegated authority under 47 C.F.R. Section 0.291 and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] Several parties sought judicial review of the portion of the Commission's decision in Docket 84-800 that ordered automatic refunds of carrier earnings in excess of the prescribed return. The D.C. Circuit Court of Appeals invalidated the Commission's decision in that regard. *See American Telephone and Telegraph Co. v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) ("*AT&T v. FCC*"), *cert. denied*, _____ U.S. _____ (1989). No party challenged the rate of return prescription itself, and that prescription remains valid.

[2] *Nader v. FCC*, 520 F.2d 182, 203-04 (D.C. Cir. 1975).

[3] *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[4] *See* 47 C.F.R. Section 65.701.

[5] We note that in *AT&T v. FCC*, the Court indicated that the Commission's automatic refund mechanism might have survived challenge if it had provided a means for taking into account the impact of a refund obligation on a carrier's overall rate of return. 836 F.2d at 1390 n.4. As noted previously, the holding and opinion in that case are not controlling here. If in response to this order to show cause, however, defendant elects to argue that the Commission should consider the impact on the defendant's overall return that would result from an award of damages in the instant proceeding, the defendant should include in its response a precise accounting of that impact.

[6] The Commission's Rules provide that formal complaints generally are resolved on a written record consisting of a complaint, answer, and reply. 47 C.F.R. § 1.720. The defendant has filed its answer and could not argue plausibly that judgment at this point in the proceeding violated its due process rights.

[7] Defendant's contention that portions of complainant's damage claims are barred by Section 415 of the Act is unavailing. The purpose of Section 415 is "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed." Bunker Ramo Corp., 31 FCC 2d 449, 453 (1971). The statute is not discretionary and the lapse of time beyond the limitation period not only bars the remedy but also destroys the liability. Armstrong Utilities, Inc. v. General Telephone Co. of Pennsylvania, 25 FCC 2d 385 (1970); cf. Midstate Co. v. Pennsylvania R. Co., 320 U.S. 356, 363-64 (1943); Kansas City So. R. Co. v. Wolf, 201 U.S. 133 (1923). The construction of Section 415 by the Commission and the federal courts has been strict and exceptions to its application have been confined to narrow circumstances. *Id.*; *see* Thornwell Barnes Co. v. Illinois Bell, 1 FCC 2d 1247 (1967); Ward v. Northern Ohio Telephone Company, 251 F. Supp. 606, *aff'd*, 381 F.2d 16 (6th Cir. 1967). In *Bunker Ramo*, *supra*, however, the Commission's Review Board identified two basic situations in which the strict application of the statute may be altered or affected:

> First, a statute of limitations does not begin to run until discovery of the right or wrong or of the facts on which such knowledge is chargeable in law. Secondly, the running of the period of limitations may be suspended or tolled by various causes; for example, although mere ignorance will generally not toll the statute, active fraudulent concealment by a defendant will generally do so. 31 FCC 2d at 454.

The Review Board stated that "a defendant should not be permitted to interpose the statutory time limit as a defense where his conduct is the primary reason for the tardiness of the plaintiff's action." *Id.* Thus, even though Section 415 is a substantive and jurisdictional statute of limitations, the period of

limitations may nevertheless be tolled in limited circumstances. Consistent with these guidelines, we conclude that the discovery of the "right or wrong" in the instant case occurred within the meaning of Section 415 when defendant filed its rate of return monitoring reports. Those reports showed that defendant had earned excessive returns on certain interstate access service categories for the relevant period. Until such time, complainant had no way of knowing that defendant's tariffed rates earned excessive returns and, therefore, no basis for a claim of damages. Under the circumstances, Section 415 poses no bar to complainant's claims.

[8] For purposes of this calculation, defendant should assume a study area defined by the geographical reach of defendant's filed tariffs, a maximum allowable rate of return of 13.1 percent overall interstate earnings, and a maximum allowable rate of return for any access service category of 13.25 percent. These assumptions are consistent with 47 C.F.R. Section 65.701(b) and the Commission's Order in Phase I of Docket No. 84-800, *supra*. Calculations should be explained fully with evidentiary support adequate to allow the Bureau and complainant to evaluate defendant's arguments and support documentation. To the extent defendant wishes to re-submit materials previously submitted in its Answer, defendant is encouraged to do so as long as the relation of such materials to defendant's arguments is clearly set out. All pleadings and information submitted thus far, in addition to those submitted in response to this Order, will be duly considered in making a final determination in this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 20, 1989

Common Carrier Bureau,
Domestic Facilities Division
Secretary of Defense files Petition for
Declaratory Ruling for Telecommunications
Service Priority Implementation Guidelines

Before the Common Carrier Bureau is a Petition for Declaratory Ruling submitted on July 14, 1989, by the Secretary of Defense, in his capacity as the Executive Agent for the National Communications System (NCS). The Secretary seeks Commission approval of implementation guidelines and procedures associated with the National Security Emergency Preparedness (NSEP) Telecommunications Service Priority (TSP) system rules adopted by the Commission in *Report and Order* in Gen. Docket No. 87-505, 3 FCC Rcd 6650 (1988). The TSP rules, which replace the Restoration Priority rules in 47 C.F.R. § 64.401, authorize and require telecommunications service vendors to provide priority restoration or provisioning of NSEP telecommunications services. The Commission delegated authority to the Chief, Common Carrier Bureau, to review the implementation guidelines and procedures. The Secretary has submitted for approval the NCS Directive (NCSD) 3-1, the TSP Service Vendor Handbook (NCSH 3-1-2), and the TSP User Manual (NCSM 3-1-1). Interested parties may file comments in response to the Secretary's Petition for Declaratory Ruling within 30 days of this public notice. Reply comments may be filed within thirty days thereafter. The documents submitted for approval by NCS are available for public inspection at the Commission's Public Reference Room, Rm. 6220, 2025 M St., N.W., Washington, D.C., during the hours of 8:30 a.m. - 12:30 p.m. and 1:30 p.m. - 3:00 p.m. Mondays through Thursdays. Copies may also be purchased from the Commission's duplicating contractor, International Transcription Services, 2100 M St., N.W., Suite 140, Washington, D.C. 20037, telephone (202) 857-3800. For further information, telephone James M. Talens, Chief, Domestic Services Branch, Common Carrier Bureau, at (202) 634-1800.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONG ISLAND MUSIC BROADCASTING CORPORATION — FOIA Control No. 89-37

On Request for Inspection of Records

MEMORANDUM OPINION AND ORDER

Adopted: July 21, 1989; Released: August 7, 1989

1. The Commission has before it for consideration an Application for Review filed by Long Island Music Broadcasting Corporation (LIMBC). LIMBC seeks review of a May 5, 1989 determination by the Mass Media Bureau, denying access to certain records responsive to an LIMBC request under the Freedom of Information Act (FOIA). 5 U.S.C. § 552.

2. LIMBC was the proponent of a new FM channel at Bay Shore, New York. *Report and Order* in Docket 84-293, 50 Fed. Reg. 10768 (March 18, 1985), *aff'd*, 2 FCC Rcd 1293 (1987), *pet. for recon. dismissed*, 3 FCC Rcd 876 (1988). It was also one of eighteen applicants for the new facility, *Warren Price Communications, Inc. (HDO)*, 2 FCC Rcd 4201 (1987), but LIMBC's application was dismissed for failure to adhere to procedural rules and filing dates established by the presiding Administrative Law Judge. *Warren Price Communications, Inc.*, FCC 87M-2552 (Oct. 13, 1987), *aff'd*, 2 FCC Rcd 7409 (Rev. Bd. 1987), *aff'd*, 4 FCC Rcd 1992 (1989), *pet. for recon. pending*. Further hearings in the application proceeding have been stayed. *Warren Price Communications, Inc.*, FCC 89-205, adopted June 13, 1989, released June 16, 1989.

3. The requested records relate to the allotment rule making and the ensuing multi-applicant proceeding for the new station. LIMBC seeks access to staff memoranda, correspondence and meeting notes: (1) related to MM Docket No. 84-293 (the Bay Shore allotment proceeding); (2) related to the issuance of and drafts of the Memorandum Opinion and Order in the allotment proceeding;[1] (3) related to LIMBC's Request for Declaratory Ruling in the Bay Shore application proceeding; (4) related to the issuance of *HDO* in the Bay Shore application proceeding; and (5) directed to the Chief Administrative Law Judge concerning LIMBC's application.

4. The Bureau responded that it was unable to locate any records responsive to requests (1), (2), and (5). Records responsive to requests (3) and (4) were located, and some were released, but others were withheld, in part or in their entirety, pursuant to FOIA Exemption 5. 5 U.S.C. § 552(b)(5).

5. On review, LIMBC argues that the Bureau's explanation that the rule making case file may have been discarded, lost, or misplaced is "unacceptable" because the Bay Shore rule making was "unprecedented in the history of the Commission." It requests that a further search be undertaken and that "full documentation" of that search be provided. With respect to the records withheld under Exemption 5, LIMBC argues that the *HDO* includes only a conclusion with regard to the decision to treat LIMBC's Request for Declaratory Ruling as a petition to deny, and that conclusion must have been based on "an earlier unreported decision." LIMBC argues that "any written explanation of the decision makers' reasoning leading to this action constitutes a final opinion and must be disclosed."

DISCUSSION

6. Because there was a possibility that the rule making case file was misplaced, a supplemental search has been conducted by an attorney in the Allocations Branch, Policy and Rules Division, Mass Media Bureau, and the scope of the search was expanded to include other offices, including the offices of the Commissioners. The expanded supplemental search did not uncover the rule making case file.[2]

7. Although the Rule Making case file was not found, additional documents responsive to request (2) were located. The documents, described more fully in Appendix A, are: the "Agenda Item" transmitting the draft of the 1987 *Memorandum Opinion and Order* to the Commission for action and the draft of that order; the "vote sheet" and "Minutes" reflecting the adoption of the 1987 *Memorandum Opinion and Order;* the "Agenda Item" transmitting the draft of the 1988 *Memorandum Opinion and Order* to the Commission for action and the draft of that order; a copy of only the first page of the "Agenda Item" transmitting the 1988 *Memorandum Opinion and Order* to the Commission; an internal memorandum, dated September 25, 1987, from an attorney in the Office of General Counsel to his supervisor, containing legal recommendations concerning the draft of the 1988 *Memorandum Opinion and Order;* and the "vote sheet"and "Minutes" reflecting the adoption of the 1988 *Memorandum Opinion and Order* by the Commission.

8. The "vote sheets" and "Minutes" themselves do not reflect the "delibrative process." Thus, they are not within Exemption 5 and will be made available to LIMBC. However, the notations on the vote sheets relate solely to the agency's internal practices, and they are protected from release by FOIA Exemption 2. 5 U.S.C. § 552(b)(2); *see Founding Church of Scientology v. Smith*, 721 F.2d 828 (D.C. Cir. 1983). Accordingly, those notations will be deleted from the copies of the vote sheets to be released.

9. The "Agenda Items" and the drafts of 1987 and 1988 *Memorandum Opinion and Orders* are clearly predecisional documents, part of the deliberative process, and generally exempt from disclosure under Exemption 5. 5 U.S.C. § 552(b)(5). *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1965). However, the exemption does not extend to purely factual matters or to segregable factual portions of otherwise deliberative documents. *EPA v. Mink*, 410 U.S. 73, 87-88 (1973). Thus, the segregable purely factual portions of the "Agenda Items" and draft *Memorandum Opinion and Orders* will be released.[3] The September 25, 1987 internal memorandum is also exempt from disclosure under Exemption 5, but the purely factual portions of the document will be released.

10. We have also fully reviewed the material withheld by the Bureau and find that, generally, it is exempt from release under FOIA Exemption 5. In this regard,

LIMBC's reliance on *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132 (1965) is misplaced. There the Court said that a document protected by the deliberative process privilege may lose that protection if the agency in its final decision "chooses *expressly* to adopt or incorporate [it] by reference." 421 U.S. at 161 (emphasis in original). Here, the *HDO* did not expressly adopt or incorporate by reference any document being withheld pursuant to the request. Rather, the basis for the decision on the handling and disposition of LIMBC's Request for Declaratory Ruling is set forth in the *HDO* along with the facts and published precedents relied upon. *Bristol Meyers v. FTC*, 598 F.2d 18 (D.C. Cir. 1975), cited by LIMBC, is also inapposite. There the court found that any Commission "minutes' that in fact reflected final policy determinations by the decision makers could not be protected under Exemption 5. Here, the only documents withheld are clearly predecisional and deliberative in nature. Hence, they are fully protected by Exemption 5.

11. In order to ensure the unfettered communication of opinions, evaluations, and recommendations between staff members and agency decision makers, we will release only the segregable factual portions of the records that comprise the predecisional, delibrative process of the agency. Our review of the previously witheld documents indicates that, in some instances, additional factual material may be segregated and released. The additional material to be released is reflected in Appendix A which lists all documents responsive to LIMBC's request that are being withheld in whole or in part, together with the grounds for withholding all or a portion of the subject document.

12. Accordingly, IT IS ORDERED, that the Application for Review filed by Long Island Music Broadcasting Corporation IS DENIED, except insofar as the Commission has conducted the requested supplemental search, and the May 5, 1989 decision of the Mass Media Bureau IS AFFIRMED, except insofar as some additional segregable factual material is being released.

13. IT IS FURTHER ORDERED, that the "Minutes" referred to in paragraph 8, above, along with additional segregable factual portions of the records identified in items (5), (7), and (8) in Appendix A, and the segregable factual portions of the responsive records identified as items (9) - (14) in Appendix A, will be made available to Long Island Music Broadcasting Corporation, but access to the remainder of the records listed in Appendix A IS DENIED pursuant to 5 U.S.C. § 552(b)(2) and (5).

14. With regard to the documents or portions thereof withheld pursuant to 5 U.S.C. § 552(b)(2) and (5), the requester may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).[4]

The officials responsible for this action are the following Commissioners: Dennis R. Patrick, Chairman, James H. Quello, and Patricia D. Dennis.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

APPENDIX A

The following documents were uncovered in the initial and supplemental searches conducted in response to the Freedom of Information Act request and Application for Review filed by Long Island Music Broadcasting Corporation.

(1) Two pages of undated, handwritten notes by William Kehoe, a former FM Branch staff attorney, reflecting his recollections of a discussion with his reviewing attorney, John McVeigh, concerning the drafting of a hearing designation order in the Bay Shore FM application proceeding. The notes are predecisional in that they reflect staff level discussions of matters releating to the preparation of a draft HDO.

(2) A one page handwritten internal memorandum, dated November 13, 1985, from Mr. Kehoe to Mr. McVeigh, discussing a problem encountered with one of the Bay Shore applications. The memorandum is predecisional in that it reflects staff level discussions of a matter relating to the preparation of a draft HDO.

(3) A one page handwritten internal memorandum, dated January 9, 1987, from Glenn Greisman, an FM Branch attorney, to Jim Crutchfield, an FM Branch engineer, requesting the original copy of one of the Bay Shore applications. The portions of the note being withheld are predecisional in that they reflect a staff member's views of matters relating to the preparation of a draft HDO. SEGREGABLE FACTUAL PORTIONS AVAILABLE FOR INSPECTION.

(4) A one page handwritten internal memorandum, dated April 14, 1987, from Jan Gay, Assistant Chief, Audio Services Division, to Mr. Greisman, requesting a copy of one of the Bay Shore applications. (Mr. Greisman's one page handwritten reply, dated April 15, 1987, is available in its entirety.) The portions of the memorandum being withheld are predecisional in that they relate to the handling of an application in the preparation of a draft HDO. SEGREGABLE FACTUAL PORTIONS AVAILABLE FOR INSPECTION.

(5) A one page handwritten internal memorandum, dated May 1, 1987, from Mr. Greisman to Gordon Malick, his reviewing attorney, transmitting a draft of the Bay Shore HDO for review. The portions of the memorandum being withheld are predecisional in that they reflect staff level discussions of matters in the draft HDO. SEGREGABLE FACTUAL PORTIONS AVAILABLE FOR INSPECTION.

(6) Two handwritten internal worksheets, consisting of two legal sized pages each, used by Mr. Malick in reviewing the Bay Shore applications and the draft HDO. The portions of the documents being withheld are predecisional in that they reflect staff level discussions of matters in the draft HDO. SEGREGABLE FACTUAL PORTIONS AVAILABLE FOR INSPECTION.

(7) A one page handwritten internal memorandum (on a "Routing and Transmittal Slip"), dated May 8, 1987, from Mr. Greisman to Mr. Malick, transmitting a re-edited draft of the HDO to Mr. Malick for further review. The same document contains a handwritten memorandum, dated May 11, 1987, from Mr. Malick to Mr. Greisman, returning the draft HDO for further editorial changes. The portions of the document being withheld are predecisional in that they reflect staff level discussions of matters in the draft HDO. SEGREGABLE FACTUAL PORTIONS AVAILABLE FOR INSPECTION.

(8) A one page handwritten internal memorandum, dated May 12, 1987, from Mr. Greisman, transmitting a draft of the HDO for further review by Mr. Malick, together with a copy of a 19-page, double-spaced, typewritten draft of the proposed HDO. The handwritten, transmitting memorandum was also used by Mr. Malick to return the draft to Mr. Greisman on May 12, 1987, and by Mr. Greisman to return the draft on May 14, 1987. The portions of the transmitting memorandum and the attached draft HDO being withheld are predecisional in that they reflect staff level discussions of matters in the draft HDO. SEGREGABLE FACTUAL PORTIONS AVAILABLE FOR INSPECTION.

(9) A four page internal memorandum, entitled "Agenda Item," dated December 16, 1986, transmitting a proposed draft of the 1987 *Memorandum Opinion and Order* to the Commission for action, together with a copy of the eight typewritten page proposed MO&O submitted to the Commission, and two cover sheets entitled "Agenda Item Circulation" and "Agenda Check Sheet." The portions of the "Agenda Item" and draft MO&O being withheld are predecisional in that they reflect staff opinions and recommendations to the decision makers. SEGREGABLE FACTUAL PORTIONS AVAILABLE FOR INSPECTION.

(10) A one page "vote sheet" reflecting the adoption of the 1987 *Memorandum Opinion and Order* by the Commission and containing notations relating to the publication and public release of the Commission's decision. Those notations are being withheld in that they reflect the purely internal practices of the Commission. SEGREGABLE FACTUAL PORTIONS AVAILABLE FOR INSPECTION.

(11) A two page internal memorandum, entitled "Agenda Item," bearing an October 26, 1987 date stamp, transmitting a proposed draft of the 1988 *Memorandum Opinion and Order* to the Commission for action, together with a copy of the two typewritten page draft MO&O, and a cover sheet entitled "Agenda Item Circulation." The portions of the "Agenda Item" and draft MO&O being withheld are predecisional in that they reflect staff opinions and recommendations to the decision makers. SEGREGABLE FACTUAL PORTIONS AVAILABLE FOR INSPECTION.

(12) Only the first page of the two page "Agenda Item" described in item (11), bearing a December 4, 1987 date stamp of the Office of General Counsel and containing certain handwritten notations reflecting the internal practices of that office. In addition to the portions of this document withheld in item (10), the handwritten notations reflect the deliberative process in that they relate to the manner in which various Commission offices consult on a draft order. SEGREGABLE FACTUAL PORTIONS AVAILABLE FOR INSPECTION.

(13) A one page memorandum, dated September 25, 1987, from an attorney in the Office of General Counsel, to his supervisor, containing legal recommendations concerning the draft 1988 *Memorandum Opinion and Order*. The portions of this document being withheld are predecisional in that they relate to the disposition of issues in the draft MO&O. SEGREGABLE FACTUAL PORTIONS AVAILABLE FOR INSPECTION.

(14) A one page "vote sheet" reflecting the adoption of the 1988 *Memorandum Opinion and Order* by the Commission and containing notations relating to the publication and public release of the Commission's decision. Those notations are being withheld in that they reflect the purely internal practices of the Commission. SEGREGABLE FACTUAL PORTIONS AVAILABLE FOR INSPECTION.

(15) A second copy of the same "vote sheet" with some, but not all, of the same notations. The notations are being withheld in that they reflect the purely internal practices of the Commission. SEGREGABLE FACTUAL PORTIONS AVAILABLE FOR INSPECTION.

FOOTNOTES

[1] There were two orders in Docket No. 84-293 styled "Memorandum Opinion and Order." They were the 1987 *Memorandum Opinion and Order*, 2 FCC Rcd 1293, affirming the Mass Media Bureau's decision to allot an FM Channel to Bay Shore, and the 1988 *Memorandum Opinion and Order*, 3 FCC Rcd 876, denying reconsideration of the earlier order. Both decisions appear to be within the scope of the request.

[2] LIMBC expresses doubts that the file, in what it terms an "unprecedented" rule making, has been discarded. However, the last Commission decision in the Rule Making was released February 25, 1988, 3 FCC Rcd 876, but LIMBC's FOIA request was not filed until a year later, on March 8, 1989. In this regard, we note that the Bay Shore allotment proposal promised both a first local service to Bay Shore and funding for the restoration of the Fire Island Lighthouse, but restoring the lighthouse was not of decisional significance. 2 FCC Rcd at 1295. Thus, while LIMBC's proposal was innovative, it was not so unusual or "unprecedented" as to require the retention of the case file beyond the normal six-month period.

[3] A handwritten notation on the copy of the first page of the "Agenda Item" transmitting the 1988 *Memorandum Opinion and Order* relates solely to the internal practices of the Commission, and it will be deleted from the released copy pursuant to Exemption 2.

[4] On April 20, 1989, LIMBC filed suit in the United States District Court for the Southern District of New York seeking production of the requested documents and other relief. Civil Action 2686-89. Further proceedings in that action are being held in abeyance pending action on this Application for Review.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WILCOM CELLULAR CORPORATION File No. 10050-CL-P-700-A-88

For a construction permit to
establish a new cellular system
to operate on frequency block A
in the Domestic Public Cellular
Radio Telecommunications Service
to serve the Washington 8 - Whitman
Rural Service Area.

MEMORANDUM OPINION AND ORDER

Adopted: July 5, 1989; Released: August 7, 1989

By the Chief, Mobile Services Division:

1. Under consideration are: (a) the captioned application and (b) a request for waiver of the anti-alienation provisions of Section 22.922 of the Commission's Rules filed by WKBN Broadcasting Corporation (WKBN) in regard to the captioned application of Wilcom Cellular Corporation (Wilcom).

2. On November 10, 1988, the Commission announced Wilcom as the lottery winner for the non-wireline frequency block in Rural Service Area (RSA) market number 700, Washington 8 - Whitman.[1] On December 9, 1988, WKBN, which is the parent corporation and 100% stockholder of Wilcom, notified the Commission that it had liquidated and dissolved Wilcom on December 8, 1988, and that the assets of Wilcom, including the interest of Wilcom in the cellular application for RSA market 700, had been assigned to WKBN. Concurrently with the notification, WKBN filed pursuant to Section 1.65 of the Commission's rules an amendment to its cellular application that reported this change. The amendment stated that WKBN's action had occurred for business and tax reasons and submitted that the change in ownership was *pro forma*. The amendment to the application changed the name of the applicant to WKBN Broadcasting Corporation, and included a new Exhibit 1 regarding ownership information as required by Section 22.13 (a)(1) and also a new Exhibit 2 concerning WKBN's qualifications. In addition, the amendment also included a letter from Pittsburgh National Bank revising its firm financial commitment from Wilcom to WKBN. WKBN submits that because the change in ownership from its wholly-owned subsidiary to itself does not involve a substantial change in beneficial ownership or control, the amendment to the captioned application is a "minor" one under Section 22.23 (c) of the rules.

3. By Public Notice, the Commission announced on January 17, 1989, the Wilcom application as the non-wireline tentative selectee in RSA market number 700.[2] The Public Notice did not report the amendment informing the Commission of the ownership change. No petitions to deny were filed against the unamended application.

4. Because of the ownership change, on February 17, 1989, WKBN filed a request for a waiver of Section 22.922 of the Commission's Rules. The Commission later announced the filing of this waiver request.[3]

5. Section 22.922 prohibits the assignment of any interest in an RSA application prior to the grant of a construction authorization. Accordingly, the above-described transfer of Wilcom's interest in the captioned application for Market 700 constitutes a technical violation of Section 22.922. Section 22.922 was adopted to eliminate any unnecessary delays in the implementation of service to the public. *See Amendment of the Commission's Rules for Rural Cellular Service, Third Report and Order*, 64 Rad. Reg. 2d (P&F) 1382 (1988). As for the instant transfer, the circumstances of the filing of Wilcom's application and WKBN's subsequent submission of the Section 1.65 amendment do not evidence that the application was filed with the intent to speculate in RSA applications. These circumstances show that due to the dissolution of the original applicant, Wilcom, by its parent company, WKBN, who for business and tax reasons sought to effectuate a restructuring of its corporate assets, the change in the ownership rights in the application from Wilcom to WKBN is a *pro forma* one. Thus, we conclude that the transfer of ownership in this instance will not thwart the objectives the Commission wanted to achieve when it adopted the anti-alienation rule. Moreover, we find that approval of the waiver will not delay service to the public. Therefore, in the circumstances of this case, we hereby waive the anti-alienation provisions of Section 22.922 of the Commission's Rules with regard to the assignment of the application from Wilcom to WKBN.

6. In addition, we find the amendment filed pursuant to Section 1.65 of the rules on December 9, 1988 to be minor. The change in the ownership of the application from Wilcom to WKBN does not involve a substantial change in beneficial ownership or control as addressed in Section 22.23 (c)(4) of the rules.[4]

7. Finally, upon consideration of the application as amended, we find WKBN to be legally, technically and otherwise qualified to construct and operate the proposed cellular system and that granting the instant application as amended would serve the public interest, convenience and necessity.

8. Accordingly, IT IS ORDERED that the request for waiver of Section 22.922 of the Commission's rules, filed by WKBN Broadcasting Corporation, concerning the application, File No. 10050-CL-P-A-88, IS GRANTED.

9. Accordingly, IT IS ORDERED that the application of WKBN Broadcasting Corporation, File No. 10050-CL-P-A-88, IS GRANTED. This authorization does not include the right to any interference protection in any areas outside the Washington 8 - Whitman RSA and is also conditioned upon coordinating with current or future co-channel licensee(s) in the areas outside the RSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells or pull back its 39 dBu contours to eliminate any interference due to an extension.

10. IT IS FURTHER ORDERED that all non-wireline cellular applications in RSA Market No. 700, Washington 8 - Whitman, other than the application of WKBN Broadcasting Corporation, ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Public Notice, Report No. CL-89-28 (released November 10, 1988).

[2] Public Notice, Report No. CL-89-65 (released January 17, 1989).

[3] Public Notice, Report No. 89-143 (released May 3, 1989).

[4] Moreover, as submitted in the amendment to the captioned application, Wilcom used to be, prior to its dissolution, the general partner in Youngstown Cellular Telephone Company, the non-wireline licensee in the Youngstown-Warren, Ohio and Sharon, Pennsylvania MSAs. The Common Carrier Bureau has already approved the *pro forma* transfer of control of Youngstown Cellular Telephone Company to WKBN that resulted from the dissolution of Wilcom. *See* Public Notice, Report No. CL-89-20 (released November 7, 1989). We also note that Wilcom, before it was dissolved, did not report the impending *pro forma* assignment of its application to WKBN and request a waiver of Section 22.922 at that time. Neither did WKBN file with the December 9, 1988 amendment a request for waiver. Thus, with the February 17, 1989 waiver request, WKBN sought action by the Commission on the waiver after the assignment was a *fait accompli*. Given the particular factual circumstances of the instant case, we do not believe that the *post facto* waiver request has a fatal impact on the subject application, particularly because the Commission had approved the *pro forma* transaction in the Youngstown context prior to the transaction taking place.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 7, 1989

THE PAPAGO TRIBAL UTILITY AUTHORITY FILES PETITION FOR WAIVER OF COMMON CARRIER BUREAU ORDER

On June 30, 1989, The Papago Tribal Utility Authority (PTUA) filed a petition for waiver of the provisions of a Bureau Order that temporarily suspended, from September 30, 1988 through March 30, 1989, Section 36.612 of the Commission's Rules and Regulations. *See National Exchange Carrier Association, Inc. Petition for Waiver of Sections 36.601(b), 36.611, 36.612 and 36.621 of the Commission's Rules*, 3 FCC Rcd 4018 (1988). Section 36.612 allows carriers to update information submitted to the National Exchange Carrier Association (NECA) for the computation of the Universal Service Fund. PTUA requests the waiver to allow it to submit updated cost data to NECA to reflect substantial increases in central office and cable and wire facilities investment incurred as a result of a 150% growth in subscribership in its service area.

Parties may file comments on PTUA's petition no later than **August 25, 1989.** Replies should be filed by **September 5, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re applications of

COMMONWEALTH	File No. 20046-CD-P/L-1-85
TELEPHONE	File No. 30423-CD-P/L-1-84
COMPANY	File No. 21966-CD-P/L-1-85

For authorization for new one-way facilities to operate on frequency 152.84 MHz in the Public Land Mobile Service at Freeland, Bloomsburg and Williamsport, Pennsylvania, respectively.

MOBILFONE OF	File No. 20940-CD-P/L-85
NORTHEASTERN	File No. 20948-CD-P/L-85
PENNSYLVANIA, INC.	

For authorization for one-way facilities to operate on frequency 152.84 MHz in the Public Land Mobile Service at Rutland Township, Bloomsburg and Williamsport, Pennsylvania, respectively.

SCHUYLKILL	File No. 20939-CD-P/L-1-85
MOBILE FONE,	File No. 22535-CD-P/L-1-85
INC.	

For authorization for one-way facilities to operate on frequency 152.84 MHz in the Public Land Mobile Service at Catawissa and Treverton, Pennsylvania, respectively.

ERRATUM

Released: August 7, 1989

In the captioned Memorandum Opinion and Order (MO&O) FCC 89-209, released June 29, 1989, one of Schuylkill's refiled applications was incorrectly listed.

Paragraph 6 of the MO&O should read:

" . . . Schuylkill, on November 17, 1986, refiled applications, for 152.84 MHz at Treverton (File No. 20800-CD-P/L-87) . . . "

Paragraph 17 should read as follows:

" . . . and the November 17, 1986 newly filed applications of Schuylkill Mobile Fone Inc. (File No. 20800-CD-P/L-87 and 20801-CD-P/L-1-87) ARE DISMISSED."

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 69 of the Commission's Rules Relating to the Assessment of Charges for the Universal Service Fund and Lifeline Assistance	**CC DOCKET NO. 78-72** **CC DOCKET NO. 80-286**

MEMORANDUM OPINION AND ORDER

Adopted: July 21, 1989; Released: August 7, 1989

By the Commission:

I. INTRODUCTION

1. On November 9, 1988, we released a *Notice of Proposed Rule Making*[1] (*Notice)* in this docket in which we proposed to change the criteria governing which interexchange carriers (IXCs) would be assessed charges for costs attributable to programs designed to enable high-cost local exchange carriers (LECs) to keep local service rates affordable, known as the Universal Service Fund (high cost fund), and programs designed to assist low-income households to obtain and afford telephone service, known as Link Up America and the federal subscriber line charge waiver programs (lifeline assistance programs). Under current rules proposed by the Joint Board and adopted by this Commission, all of these programs, commencing April 1, 1989, are funded by a charge assessed on IXCs in proportion to their number of presubscribed lines. Pursuant to Sections 69.116 and 69.117 of our existing rules, a per-line charge would be assessed on all IXCs that have at least one percent of all presubscribed lines on a nationwide basis, or at least five percent of the presubscribed lines in any one study area and a minimum of one thousand presubscribed lines in that study area.[2] This charge is to be computed and assessed by the National Exchange Carrier Association (NECA) based on data submitted to NECA by the LECs.

2. As we stated in the *Notice*, preliminary data collected by NECA indicates that our existing presubscribed lines criteria yields unexpected and anomalous results in the selection of the IXCs that are assessed charges for high cost and lifeline assistance support. Specifically, NECA reports that, based on its analysis of presubscribed lines, our present rules will cause some very small IXCs to be billed for high cost and lifeline assistance support while other medium-sized IXCs will not be billed. The *Notice* proposed to reformulate our existing criteria and require that only IXCs with more than .05 percent of all nationwide presubscribed lines pay the per-line charge to fund these programs. The Common Carrier Bureau subsequently granted a waiver to enable NECA to file its 1989 access tariff based on the proposal in the *Notice* subject to our final action in this proceeding.[3] That tariff is presently in effect.

3. In this order, we conclude that the rules proposed in the *Notice* more equitably distribute the burden of supporting high cost and lifeline assistance among IXCs, and we amend our rules accordingly.

II. BACKGROUND

4. On March 31, 1987, the Joint Board released a *Recommended Decision* which recommended improvements in the existing non-traffic-sensitive (NTS) cost recovery mechanisms.[4] It recommended action related to the recovery of subscriber line charges, an expansion of the federal lifeline assistance program, a retargeting of high cost assistance measures, and a restructuring of the existing common line tariff and pooling system.[5] This Commission adopted the Joint Board's conclusions and integrated recommendations in our May 19, 1987 *NTS Recovery Order.*[6] The *NTS Recovery Reconsideration Order* made several minor modifications in response to various petitions for reconsideration.[7]

5. Prior to April 1, 1989, the costs associated with the high cost fund and lifeline assistance programs were recovered through the nationwide common line pooling process and the carrier common line (CCL) charge.[8] Effective upon implementation of the revisions to the present pooling mechanism on April 1, 1989, the rules governing the funding of these programs were amended. These rules now provide that NECA will administer separate high cost and lifeline assistance cost/revenue "pools" and that the costs will be recovered through flat-rate, per-line charges assessed on IXCs based on the number of "1+" lines "presubscribed" to each such carrier.[9] Although NECA bills the charges and collects and disburses the funds, charges for these elements must be included in the access tariffs of all LECs.[10] Pursuant to our existing rules, the separate high cost and lifeline assistance charges are assessed on IXCs that have at least (1) one percent of the total presubscribed lines in all study areas, or (2) five percent of the presubscribed lines in any study area and a mimimum of 1000 presubscribed lines in that study area. The Joint Board observed that this formula was designed to fairly distribute the responsibility for the high cost fund and lifeline assistance programs among more than just the few largest IXCs, and also take into account the fact that an IXC could be the dominant carrier in a particular area, even though it may not have a substantial presence nationwide.[11]

6. At the end of 1987, NECA conducted a voluntary data collection to gather presubscribed line information from the LECs to develop a workable new system for high cost and lifeline billing.[12] NECA received data from most of the LECs in January 1988, and reported the results of this data collection in a June 2, 1988 letter to the Chief of the Common Carrier Bureau.[13] In that letter, NECA explained that, using the preliminary data, it had identified the IXCs that would be assessed high cost and lifeline assistance charges under the criteria identified in our revised rules. According to NECA, this study revealed that under those rules, several very small IXCs would be billed for these costs while other medium-sized IXCs would not. NECA observed that this result occurred because certain smaller IXCs, with all their lines concentrated in a single study area, met the five percent threshold, while other IXCs with much larger total numbers of lines operating in a number of study areas, failed to qualify under either the "one percent" or the "five percent" criterion.[14]

7. On July 22, 1988, the Chief of the Common Carrier Bureau requested additional information from NECA,[15] including which IXCs would be billed for high cost and lifeline assistance charges using the presubscribed line criteria contained in our present rules, and which IXCs would be assessed if the standard relating to presubscribed lines within a single study area were eliminated and a nationwide percentage were set at lower threshold levels. In response, NECA provided an analysis of the data submitted by the LECs in January 1988. NECA indicated that, based on this early 1988 data, a total of 26 IXCs would be billed for these costs under our present rules.[16] This group did not, however, include three of the ten largest IXCs (in terms of presubscribed lines), yet encompassed the eighty-fourth largest IXC because of the "five percent in a study area" rule.[17] NECA also provided data on which IXCs would qualify if the thresholds were .25, .10, .05, .025 or.01 percent of nationwide lines and the criterion of five percent of presubscribed lines in a study area were eliminated altogether.

8. On November 9, 1988, we issued the *Notice* in which we proposed an adjustment to our current rules. Prompted by the unexpected and anomolous results that occurred with the use of our existing criteria, we proposed to adjust our rules to require high cost fund and lifeline assistance payments from IXCs only when an IXC had .05 percent of presubscribed lines nationwide. We expected that this adjustment would reduce the discriminatory effect of our current rules on small IXCs and simplify the tasks of administering these programs. However, we cautioned that the use of a lower nationwide threshold would mean that some IXCs that are not required to pay the high cost fund and lifeline assistance charges under the present rules would be so required under the proposed amendment.

III. ADJUSTMENT OF CURRENT CRITERIA FOR ASSESSMENT OF HIGH COST/LIFELINE CHARGE

A. Positions of the Parties[18]

9. In general, most commenters favor some adjustment of our current criteria for the assessment of these charges to better distribute the burden of bearing the cost of these programs. Many, although not all of the parties that support change agree that the proposed adjustment will be adequate to produce an equitable contribution formula. A minority of commenters contend that the proposed rules will create marketplace distortions and adversely affect small businesses.

10. NECA supports the proposed rule change. Under the current "dual qualification" rules, it says, results are produced that do not appear consistent with the expectation of the Joint Board or this Commission in developing the high cost and lifeline funding charges.[19] NECA believes that the use of the proposed criterion is reasonable and presents no undue administrative burden.[20]

11. OPASTCO also supports the proposed rule change. It states that under present rules small IXCs would bear the burden of supporting the high cost and lifeline assistance programs while medium-sized IXCs avoid this responsibility because of a flaw in our rules.[21] OPASTCO says that changing the current rules to provide a lower nationwide threshold for qualification will more equitably distribute these costs.

12. RCI concurs with NECA and OPASTCO that the threshold criteria for assessment of these charges should be changed. In RCI's view, the threshold should be based entirely on a nationwide percentage of presubscribed lines, rather than partially on the percentage of presubscribed lines in a single study area.[22] It is unreasonable and discriminatory, says RCI, to require small carriers with a high concentration of presubscribed lines in one study area to support these programs while some larger carriers pay nothing. According to RCI, this Commission's policies should, if anything, reduce burdens upon small, locally based carriers. RCI also suggests that it may be administratively infeasible for NECA to collect funds from very small carriers.

13. USTA also supports the proposed rule change. It believes that IXCs would be treated on a more equitable basis if the proposed rule were adopted and that the proposed rule reflects a billing arrangement that provides a "level playing field" for all interexchange competitors.[23] Moreover, USTA notes that the proposal does not appear to affect the security of high cost funding that is essential for certain high cost small local exchange carriers to keep local rates affordable. Indeed, USTA notes that the proposal could result in a decrease in the level of uncollectibles.

14. MCI takes a different view. MCI agrees with a move in the direction of spreading the cost recovery of the high cost fund and lifeline assistance programs across a greater number of IXCs but argues that we should lower the threshold for contribution even more. According to MCI, if the threshold criteria were to be .01 percent of the national number of presubscribed lines, the amount that qualifying IXCs would have to bear in addition to their direct percentage of the costs would be reduced by 72 percent.[24] Beyond this, it says, the lower threshold would minimize the marketplace distortions created by relieving one class of IXCs from the burden of funding these programs.[25] MCI believes that our current proposal leaves too much cost to be borne by the qualifying IXCs and is therefore unreasonable. It urges that lowering the threshold criteria for contribution to the high cost fund and lifeline assistance programs is a far more equitable approach to funding. Finally, MCI says that the equity inherent in its suggestion to lower the threshold criteria is not outweighed by administrative costs of implementing programs with more qualifying IXCs.[26] MCI says that under the lower threshold that it proposes, NECA would be required to maintain only 62 accounts -- instead of 23 under current rules -- for the interstate carriers that would qualify for paying high cost and lifeline charges. It argues that the marginal cost of billing these additional carriers is small.

15. US Sprint also agrees that we should adjust the current threshold for contribution to the high cost fund and lifeline assistance programs. Like RCI, US Sprint says that this Commission is correct in its determination that the criteria for the assessment of high cost and lifeline charges should be the IXC's size, as expressed solely as a percentage of nationwide presubscribed lines.[27] However, like MCI, US Sprint says that we should go further than our proposed adjustment and lower the criterion to .01 percent of nationwide presubscribed lines. In US Sprint's view, lowering the threshold would not produce undue administrative costs for NECA.[28] It argues that since NECA presumably must make a nationwide run of data for all carriers -- no matter what the cutoff point is -- to

determine which carriers are subject to assessment, lowering the cutoff point should not affect the costs of calculating high cost and lifeline assistance charges. Furthermore, it claims, lowering the eligibility threshold to .01 percent would still result in a monthly bill to the smallest carrier of $1,835, an amount high enough that the associated billing and collection costs should be relatively *de minimis*.[29]

16. USTS agrees that some change in the current rule may be in order.[30] However, USTS strongly opposes our proposal to limit applicability of the charge to IXCs with more than .05 percent of the nationwide presubscribed lines. In USTS' view, the proposed threshold is "much too high".[31] Instead, USTS argues that we should adopt a rule that would make high cost and lifeline funding charges applicable to all IXCs having more than 1,000 presubscribed lines.[32] USTS contends that the most equitable approach to funding these programs is to make the assessment of the charge as broadly based as possible.[33] Similar to US Sprint, USTS questions NECA's claim that the administrative cost of assessing high cost and lifeline charges on IXCs that fall below the proposed .05% threshold would outweigh the revenue that would be received from carriers below that level.[34] USTS argues that since NECA must collect presubscribed line data for virtually all, if not all, IXCs from every study area in order to determine whether a particular IXC's national presubscribed line count exceeds the established threshold, there are no apparent cost savings, at least in terms of establishing the basic data base, between the relatively high threshold proposed in the *Notice* and a lower threshold.

17. ALC opposes elimination of the existing dual criteria contained in the current rules. ALC maintains that the proposed rules will create an economic incentive for medium size national carriers to consider reorganizing into separate subsidiaries or regional carriers in order to avoid any assessment of charges.[35] In addition, ALC suggests that if this Commission chooses to "revisit" the Joint Board's originally recommended criteria for qualifying carriers to help subsidize these programs, then the Joint Board should have an opportunity to review the issue and propose changes.[36]

18. LinTel also opposes the proposed rule change. According to LinTel, the application of the contribution formula described in the *Notice* will impose serious adverse consequences on its viability as a recent entrant into the long distance market. LinTel says that despite its number of presubscribed access lines, its customer base is uniquely comprised of a large number of generally high cost, low profit customers. As a consequence, LinTel explains that while its number of lines would suggest that it is one of the larger carriers in the country -- and therefore subject to high cost and lifeline assistance charges -- its revenues and after-tax profit show that it would be unreasonable to impose such charges.[37] LinTel further states that this Commission's articulation of a reasoned basis for its proposed changes is deficient.[38] According to LinTel, it is not possible from a review of the *Notice* to determine the cost of the high cost and lifeline assistance programs, and therefore, it cannot be determined whether the revised formula of charges bears a rational relationship to NECA's proposed system of cost recovery.[39]

19. The ALC reply reiterates that this Commission should not modify the proposed rules until the Joint Board is provided an opportunity to propose changes that address its concerns.[40] It further argues that a revised nationwide criterion that does not consider regional concentrations of large carriers will unfairly favor regional carriers. ALC stresses that regional carriers may be as large and financially robust as the small national carriers with whom they compete, but because of the regional nature of their operations, regional carriers may fall below the national threshold for high cost and lifeline contribution.[41]

20. LinTel replies that the proposed "adjustment" does not sufficiently ameliorate the detrimental financial impact that the proposed charges would have on small IXCs.[42] It says that the suggestion by some IXCs that the proposed assessment be more broadly based by lowering the applicable threshold for the charge is logical and theoretically helpful, but does not eliminate the problem for LinTel since it will still be assessed charges.

21. PRTA replies that this Commission is mistakenly attempting to use the number of presubscribed lines as a basis to impose federal charges for high cost and lifeline assistance. PRTA claims that it is inconsistent with the stated goals of the *Notice* to use the number of presubscribed lines as a surrogate for determining financial ability of a company to pay such charges.[43] PRTA claims we should explicitly provide for waivers of high cost and lifeline charges for certain companies upon appropriate showing that the public interest would not be served by assessing such charges on them.[44] Such waivers would be particularly appropriate in Puerto Rico, it says. PRTA believes that treating Puerto Rico-based IXCs like all other IXCs in the country for purposes of high cost and lifeline charges could impose a disproportionately severe burden on Puerto Rico based IXCs.[45] PRTA maintains that for Puerto Rico-based IXCs, a large number of presubscribed lines does not indicate a large interstate traffic base to support high cost and lifeline assistance charges.[46]

B. Discussion

22. The record reveals that many parties support our proposal for the reasons we advanced in the *Notice*. However, a number of parties claim that the threshold level should be moved even lower, while others oppose any change in the current rules.[47] Based on our review of the record as a whole, we have decided to amend our rules as proposed in the *Notice*. Identifying IXCs subject to high cost and lifeline assessments necessarily involves a balancing of the benefits of having a sufficiently broad based charge with the costs of administering (including collecting) the charges for very small IXCs. We believe that the minor adjustment we proposed strikes an appropriate balance and is most consistent with the Joint Board's intent and our original intent in adopting the changes. Moreover, we initiated this proceeding to correct unanticipated discriminatory effects and believe that proposals to move to a lower threshold than the one we propose go beyond that basic purpose.

23. It is true, of course, that the theoretical number of contributors to the fund would increase if we were to designate a lower threshold for high cost and lifeline payment. However, as NECA indicates, the proposal we adopt already captures almost 99% of the nation's presubscribed lines. Moreover, any advantage of raising the number of contributors could be quickly neutralized by the administrative and cost drawbacks of collecting fees from a more volatile population of IXCs. As USTS ap-

pears to recognize, developing a database of potential USF and lifeline contributors is quite different from implementing a funding program and collecting charges. Indeed, lowering the threshold criteria for payment to the level advanced by MCI, US Sprint or USTS could result in a shortfall of expected collectibles that could hamper high cost and lifeline support programs while increasing the costs for administering these programs.

24. We are not persuaded by ALC's contention that our proposed rule will "galvanize" medium-sized IXCs that are required to contribute to high cost and lifeline assistance to reorganize into regional carriers. Such commonly controlled entities would be a single IXC for purposes of this assessment.

25. We believe that our proposed criterion, generally supported by a majority of commenters, is reasonable to accomplish the goals of high cost and lifeline funding without the administrative inefficiency and unnecessary cost that could result from using a lower threshold criterion. In addition, the proposed rules correct problems associated with our current rules that were unanticipated at the time they were developed. We do not agree with ALC that this implementation issue, which involves a straightforward adjustment in the threshold level for high cost and lifeline assistance payment, is of sufficient magnitude to justify the initiation of a formal, and potentially time consuming, Joint Board process.[48] For these reasons, we adopt the proposed criterion of the *Notice*.

IV. APPLICATION OF USF/LIFELINE CHARGE TO INTEREXCHANGE OPERATIONS OF LECS

A. Positions of the Parties

26. ALC claims that the proposed criteria for assessing interstate high cost and lifeline charges is arbitrary and discriminatory because not all carriers -- particularly the Bell Operating Companies (BOCs) -- are subject to these charges. In ALC's view, this Commission has failed to provide sufficient justification for allowing BOCs to avoid these charges. ALC says that the BOCs are interstate carriers (in that they all carry intraLATA interstate traffic and some carry "corridor traffic") and that, historically, the BOCs have funded high cost and lifeline assistance through the carrier common line charge.[49] In ALC's view, the BOCs' obligation to pay should continue regardless of the implementation of any new threshold criteria for funding those programs.[50]

27. ALC urges us to clarify that all interstate toll carriers, including the BOCs, are required to pay these charges. ALC says that this would eliminate any ambiguity in the interpretation of our rules and would assure that NECA could not understate the count of presubscribed lines in computing any proposed charges.[51] ALC says that NECA, in assessing high cost and lifeline charges, has narrowly read "1+" presubscription to be limited to interLATA presubscription despite the fact that the BOCs routinely complete interstate toll calls over intraLATA presubscribed lines.[52] ALC contends that subjecting the BOCs' interexchange toll activities to these charges is in keeping with Commission policies that repeatedly interpret "interexchange carrier" to include the BOCs in determining which carriers are subject to access charges.[53] At a minimum, says ALC, we should require the submission of more current data in order to determine the BOC intraLATA presubscribed line count.[54]

28. ALC further argues that there is no substantiation for the claim that NECA would suffer an unreasonable administrative burden if all carriers, including the LECs, were required to pay high cost and lifeline assistance.[55] According to ALC, should this Commission determine that NECA is incapable of assuming this task, then it should simply require the LECs to collect the charge for NECA as they have successfully done for the past four years.

29. The LECs oppose ALC's request for clarification. In their view, the rules governing the assessment of high cost and lifeline assistance charges are already clear and cannot be interpreted in the manner advocated by ALC. Furthermore, the LECs oppose any amendment of these rules that would include them in the assessment of high cost and lifeline charges based on presubscribed lines. Such action, they say, goes beyond the intended scope of the *Notice* and is an untimely request for reconsideration of the Commission's order adopting the Joint Board's recommendation.[56]

30. For example, Ameritech replies that ALC improperly characterizes local exchange carriers who carry intraLATA interstate calls as IXCs and says that ALC offers no authority for its statement that this Commission has "repeatedly" interpreted the term IXC to include the LECs.[57] In Ameritech's view, LECs that carry intraLATA interstate calls as a small part of their businesses are not IXCs serving presubscribed lines.[58] It says that ALC apparently ignores the MFJ's restrictions on the BOCs and the limited exceptions that authorized the carrying of intraLATA interstate traffic.

31. Bell Atlantic agrees that the LECs should not be subject to these charges for their carriage of intraLATA traffic.[59] In any event, it explains that only exchange carriers in LATAs that cross state boundaries would be subject to these charges, while exchange carriers in wholly intrastate LATAs would not. As a result, Bell Atlantic says that this suggestion would result in only a limited number of subscriber lines being added to the lines now subject to the charge. Moreover, it argues that because these lines are already presubscribed to a long distance carrier, each such line would be subject to two high cost and lifeline charges through "double counting".[60]

32. NYNEX states that ALC's suggestion to "double count" access lines for the sole arbitrary purpose of imposing approximately one-half of high cost and lifeline assistance burden on the LECs should be rejected as substantively without merit.[61] NYNEX argues that ALC's proposal is contrary to the express language of our orders and rules. Moreover, it claims that ALC's assertion that many LECs complete interstate calls is misplaced. NYNEX explains that although some LECs do complete a small number of interstate toll calls where a single LATA includes two or more states, such instances are the exception, and not the rule.[62] NYNEX says that LEC completed interstate calls are *de minimis* when compared to the total volume of IXC interstate calls.[63]

33. In reply, ALC reiterates its claim that this Commission has consistently interpreted its access charge rules such that "[t]oll traffic between exchanges within the cross-boundary LATA is carried by the BOC or independent telephone company acting as an 'interexchange car-

rier'."[64] ALC urges that this policy should not be ignored simply because an access charge is assessed on a "presubscribed line" basis, rather than a usage basis.[65]

34. ALC also responds to the assertion by certain BOCs that its request that intraLATA interstate presubscribed lines be included in the assessment of high cost and lifeline charges is a "new" proposal. In fact, it says, the request is only for an interpretation of the existing or proposed rule that assures that the BOCs continue to pay their fair share towards public policy programs. ALC stresses that it seeks only to assure that access charges continue to apply to LECs that provide intraLATA interstate toll service.[66]

B. Discussion

35. Our *Notice* did not propose extending the assessment of high cost and lifeline assistance charges to exchange carriers that provide interexchange, interstate service. Indeed, as SWBT observes, the *Notice* contains an explicit statement that "[e]xchange carriers will not be affected by any action on the proposals presented in this *Notice*."[67] Rather, as a number of parties observe, we initiated this proceeding to fine-tune the eligibility criteria for these charges to correct what appeared to be anomolies resulting from our current rules. ALC urges an interpretation of our rules that would work a major alteration in their scope by effectively treating many lines in the country as having two presubscribed interstate carriers and subjecting a new set of entities to these charges. Such proposals are beyond the scope of this limited proceeding. Accordingly, we deny the request of ALC and other parties for a clarification that our rules include the interexchange operations of the LECs in the determination of high cost and lifeline assistance assessment criteria.[68]

V. REGULATORY FLEXIBILITY CERTIFICATION

A. Positions of the Parties

36. LinTel states that this Commission has failed to conduct a regulatory flexibility review that would assuredly reveal that small businesses are adversely affected by the proposed change in formula.[69] LinTel claims that the *Notice's* initial certification that its proposed rule will not have a significant economic impact on small entities is not factually supported and should be revised.[70] Therefore, it says, we should reexamine our tentative conclusion as stated in the *Notice* and consider the effects of the proposed Rule Making on small businesses.[71]

B. Discussion

37. The Regulatory Flexibility Act is not literally applicable to this proceeding. As stated in previous rulings, that Act is designed for the protection of small businesses that are directly subject to our administrative rules rather than businesses that are indirectly affected.[72] Since our Part 69 access charge rules (of which the instant rule is a part) are imposed upon local exchange carriers that are required to compute and collect access charges in accordance with such rules, exchange carriers are the only businesses that are entitled to claim some protection under the Act.[73] As an interexchange carrier that simply pays these charges rather than an exchange carrier subject to our access rules, LinTel may not claim protection of the Act in this proceeding. For this reason, we do not apply the formal procedures set forth therein.

38. Nevertheless, as we have stated in other proceedings, we are committed to reducing the regulatory burdens on small telecommunications companies whenever possible, consistent with our other public interest responsibilities.[74] Indeed, we have already sought to do just that by adjusting our current criteria for high cost and lifeline contribution. Specifically, based on data supplied by NECA, we believe that the use of the adjusted criteria will result in fewer small IXCs being billed for high cost and lifeline assistance than would be the case under our existing rules. As we stated in the *Notice*, the rule will thus have a net positive effect on smaller IXCs. Beyond this, we are committed to informally monitoring the effects of our adjusted criteria on small companies.

VI. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED, That pursuant to Sections 4(i), 4(j), 201-205, 218, 220, 403, and 404, of the Communications Act of 1934, 47 USC §§154(i), 154(j), 201-205, 218, 220, 403, and 404, the policies, rules, and requirements set forth herein ARE ADOPTED effective 30 days from the release of this order.[75]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Comments:

ALC Communications Corporation (ALC)

LinTel Systems, Inc. (LinTel)

MCI Corporation (MCI)

National Exchange Carrier Association (NECA)

Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)

RCI Corporation (RCI)

United States Telephone Association (USTA)

United States Transmission Systems, Inc. (USTS)

US Sprint Communications (US Sprint)

Parties Filing Reply Comments:

ALC Communications Corporation (ALC)

Ameritech Companies (Ameritech)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Corporation (BellSouth)

GTE Service Corporation (GTE)

LinTel

NYNEX Telephone Companies (NYNEX)

Puerto Rico Telephone Authority (PRTA)

Southwestern Bell Telephone Company (SWBT)

APPENDIX B

Part 69 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 69 - ACCESS CHARGES

1. The authority for Part 69 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Sections 69.5 is amended by revising paragraph (d) to read as follows:

§ 69.5 Persons to be assessed.

* * * * *

(d) Universal Fund and Lifeline Assistance charges shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunicatons services and that have at least .05 percent of the total common lines presubcribed to interexchange carriers in all study areas.

3. Sections 69.116 is amended by revising paragraph (a) to read as follows:

§ 69.116 Universal service fund.

(a) A charge that is expressed in dollars and cents per line per month shall be assessed upon all interexchange carreirs that use local exchange switching facilities for the provision of interstate or foreign telecommunications services and that have at least .05 percent of the total common lines presubscribed to interexchange carriers in all study areas.

* * * * *

4. Section 69.117 is amended by revising paragraph (a) to read as follows:

§ 69.117 Lifeline assistance

(a) A charge that is expressed in dollars and cents per line per month shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services and that have at least .05 percent of the total common lines presubscribed to interexchange carriers in all study areas.

* * * * *

FOOTNOTES

[1] In the Matter of Amendment of Part 69 of the Commission's Rules Relating to the Assessment of Charges for the Universal Service Fund and Lifeline Assistance, *Notice of Proposed Rule Making*, 4 FCC Rcd 2041 (1988).

[2] *See* 47 C.F.R. §§ 69.116 & 69.117 (1987).

[3] *See* In the Matter of Annual 1989 Access Tariff Filings Petitions for Waiver and Petition for Reconsideration, *Memorandum Opinion and Order*, 4 FCC Rcd 413, 420 at para. 64 (Com. Car. Bur. 1988).

[4] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Recommended Decision and Order*, 2 FCC Rcd 2324 (1987) (*Recommended Decision*).

[5] Specifically, the approach developed by the Joint Board endorsed the existing lifeline assistance program that exempted qualifying subscribers from subscriber line charges when matching state benefits are provided pursuant to a certified state plan, and proposed that federal benefits be increased to correspond with the prescribed subscriber line charge increases. In addition, the subscriber line charge waiver program was supplemented by a new program called Link Up America, targeted to provide assistance to reduce initial service installation and connection charges, which appeared to be a major barrier to telephone subscribership for low income groups. The Joint Board also reviewed the existing high cost assistance measures that permit LECs in study areas with above-average loop costs to allocate additional costs to the interstate jurisdiction, and recommended that the high cost assistance program be retargeted to provide greater assistance to small and medium size LECs and less assistance to the larger LECs. Finally, it endorsed significant modifications in the existing common line tariff and pooling system. *See generally Recommended Decision.*

[6] However, our order modified the proposed implementation schedule for subscriber line charge increases. MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Report and Order*, 2 FCC Rcd 2953 (1987)(*NTS Recovery Order*).

[7] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Memorandum Opinion and Order on Reconsideration and Order Inviting Comments*, 3 FCC Rcd 4543 (1988)(*NTS Recovery Reconsideration Order), petition for review pending, Public Service Commission of the District of Columbia v. FCC*, D.C. Cir. No. 88-1661 (petition filed Sept. 12, 1988).

[8] *See Recommended Decision* at 2332-34, paras. 71 & 87.

[9] *See* 47 C.F.R. §§ 69.116 & 69.117.

[10] *See* 47 C.F.R. § 69.4(c).

[11] *See Recommended Decision* at 2332-34, paras. 71, 76 & 87. Our rules require the LECs to provide information necessary to determine the allocation of presubscribed lines among IXCs. Each LEC must report to NECA, on a semi-annual basis, the number of "1+" access lines associated with each IXC serving a study area, and NECA will use the data to update the listing of the IXCs' presubscribed lines. NECA will compute and directly bill the charges to qualifying IXCs on an annual basis and will administer the high cost fund and lifeline assistance programs, including distribution of revenues to the LECs. *See* 47 C.F.R. §§ 69.116 & 69.117.

[12] NECA had requested on reconsideration of the *NTS Recovery Order* that we modify our rules to require the initial submission of presubscribed lines data from the LECs by December 1987 in order to permit it sufficient time to develop a billing system. A letter from the Common Carrier Bureau informed

NECA that, given the timing of the order on reconsideration, a voluntary data request to the LECs would best address NECA's immediate needs. *See* Letter from Gerald Brock, Chief, Common Carrier Bureau, to Jacob J. Goldberg, Vice President-Tariff, Cost and Regulatory Matters, NECA (December 14, 1987).

[13] *See* Letter from Jacob J. Goldberg, Vice President-Tariff, Cost and Regulatory Matters, to Gerald Brock, Chief, Common Carrier Bureau (June 2, 1988).

[14] NECA attached a chart to its June 2, 1988, letter to illustrate this phenomenon. The chart excluded the three largest IXCs, that would each qualify under the one percent criterion, and provided a sampling of the remaining IXCs. The chart indicated that three medium-sized IXCs with .61, .18, and .16 percent of all presubscribed lines would not be assessed the high cost and lifeline assistance charges because those IXCs had neither one percent of the lines nationwide, nor five percent in one study area (1000 lines minimum). By contrast, four smaller IXCs with .07, .05, .02, and .01 pecent of all presubscribed lines, would pay the charges because those IXCs each had more than five percent of the lines in a single study area.

[15] *See* Letter from Gerald Brock, Chief, Common Carrier Bureau, to Jacob J. Goldberg, Vice President-Tariff, Cost and Regulatory Matters, NECA (July 22, 1988).

[16] NECA has updated this study with more recent information on presubscribed lines submitted by the LECs on August 1, 1988. *See* NECA Comments at Appendix A (Analysis of Alternative PSL Qualification Criteria).

[17] NECA noted that the smallest qualifying IXC under the present rules has only 3,773 presubscribed lines, and its estimated monthly billing amount (based on a $.25 per-line charge) would be $943.

[18] Parties filing comments or replies are listed in Appendix A. We use the abbreviations listed in that appendix throughout this order.

[19] NECA Comments at 3. NECA says that the proposed rules will distribute the funding requirement for the high cost and lifeline assistance programs across a broader spectrum of carriers. For example, it says that based on data submitted by the LECs on August 1, 1988, current rules require 16 IXCs representing 97.76% of the industry's presubscribed lines to pay the charges, while the proposed rules would qualify the top 20 IXCs representing 98.94% of the industry's presubscribed lines as contributors.

[20] *Id.* at 1-3. NECA notes that it is required to bill and collect from each qualifying IXC its portion of the high cost and lifeline assistance funding requirement on a monthly basis. *Id.* at 2 n. 3.

[21] OPASTCO Comments at 1-4.

[22] RCI Comments at 1.

[23] USTA Comments at 1-2.

[24] MCI relies upon information supplied by NECA (reprinted in Appendix A of the *Notice)* and information contained in the Local Exchange Carriers' Annual 1988 Access Charge filings, but does not provide a detailed description of how it calculated this figure. MCI Comments at 4-5.

[25] *Id.* at 6.

[26] *Id.* at 5-6.

[27] US Sprint Comments at 1-2.

[28] *Id.* at 2-3.

[29] *Id.* at 2.

[30] USTS Comments at 2.

[31] USTS estimates that under the proposed rule, an IXC at the threshold level would be assessed an annual charge of $183,000. USTS says that while this may not be a substantial amount for AT&T, MCI, or US Sprint, it is a significant cost for many of the other IXCs that will be charged. Even more importantly, USTS stresses that many of the other IXCs are engaged in vigorous competition with a number of regional carriers, which, within their region, may be as large and financially robust as smaller national carriers, but because of the regional nature of their operations, may well fall below the national threshold. *Id.* at 2-3.

[32] USTS says that even at the 1,000 line minimum, the annual assessment for the smallest carrier would be $3000. *Id.* at 3.

[33] *Id.* at 2-4.

[34] *Id.* at 3.

[35] ALC Comments at 8-9.

[36] *Id.* at 1-6.

[37] LinTel Comments at 3.

[38] *Id.* at 8-11.

[39] *Id.* at 12.

[40] ALC Reply at 1.

[41] *Id.* at 4-5.

[42] LinTel Reply at 1-3.

[43] PRTA says that this criterion may create the same kind of unexpected and anomalous results that prompted the proposed reformulation of our existing criteria. In particular, it says, the proposed threshold may unfairly sweep in IXCs that have a large number of presubscribed lines but that may be unable to bear the financial burden of the charges due to status as a new market entrant or for other specific reasons. PRTA Reply at 3.

[44] *Id.* at 2-4, 6.

[45] *Id.* at 5.

[46] PRTA says that the dominant off-island carrier is clearly AT&T, which has an enormous nationwide customer base and an unquestioned ability to pay these charges. It adds that only one-third of telephone subscribers in Puerto Rico make interstate and international calls. By contrast, it says, in the rest of the United States, more than twice that fraction of telephone subscribers make interstate and international calls. Moreover, PRTA says that there are barriers to telecommunications between Puerto Rico and off-island points that do not exist in the rest of the country, such as the disincentive created by the fact that it is impossible to make short distance -- and thus relatively inexpensive -- calls from Puerto Rico to the U.S. mainland. PRTA notes that this Commission recently has aided Puerto Rico in reducing those barriers by authorizing meaningful facilities-based competition in off-island services, but contends that the proposed rule change threatens to undermine the promise of such competition. *Id.* at 4-5.

[47] LinTel's claim that this Commission has not articulated a reasoned basis to support NECA's calculation of charges to recover the costs of the high cost fund and the lifeline assistance program is an untimely request for reconsideration of our order adopting the Joint Board's recommendations for preserving universal service. For this reason, we reject its claim. *See generally, NTS Recovery Order.*

[48] 47 U.S.C. § 410(c) does not require Joint Board proceedings to revise access charge rules.

[49] ALC cites In the Matter of Application of Access Charges to the Origination and Termination of Interstate, IntraLATA Services and Corridor Services, *Memorandum Opinion and Order*, FCC 85-172 (released April 12, 1985) (*Interstate IntraLATA Access Charge Order)*. "LATA" refers to "local access and transport

area", a term used in connection with the AT&T antitrust decree (the Modified Final Judgment or "MFJ"). Pursuant to that decree the BOCs are permitted to provide traffic within, but not between, LATAs. While LATAs are often within a single state, some LATAs cross state boundaries. "Corridor service" describes a limited exception to the MFJ interLATA service prohibition that allows some BOCs to provide certain interLATA services.

[50] ALC Comments at 2, 6. Similarly, MCI urges that the LECs should continue to contribute to high cost and lifeline assistance by imputing a portion of the existing CCL in their interstate Message Telecommunications Service (MTS) charges for program support. This proposal, it says, "would have the existing portion of the CCL that is related to Universal Service Fund (USF) and Life Line Assistance frozen at the existing percentage, collected as revenue from the imputation in the LEC's MTS charges, and netted against each of their USF and Life Line revenue requirements." *See Ex Parte* Letter from Donald F. Evans of MCI, Director of Technical Regulatory Affairs, to Donna R. Searcy, Secretary, FCC (January 9, 1989).

[51] ALC Comments at 7-8.

[52] *Id.* at 2, 6.

[53] *Id.* at 7-8. *See Interstate IntraLATA Access Charge Order.*

[54] ALC Comments at 2 n. 5. ALC contends that the rate effect of its proposal would be substantial -- resulting in an almost halving of the per line rate, caused by a near doubling of the count of presubscribed lines.

[55] *Id.* at 4-6.

[56] *See* Ameritech Reply at 2-4; Bell Atlantic Reply at 4; BellSouth Reply at 4-5; GTE Reply at 1-4; NYNEX Reply at 1-3; SWBT Reply at 2.

[57] Ameritech Reply at 4; *see also* BellSouth Reply at 1-2.

[58] Ameritech Reply at 5.

[59] Bell Atlantic Reply at 2.

[60] *Id.* at 3.

[61] NYNEX Reply at 1-3.

[62] *Id.* at 4-5. NYNEX says that ALC fails to recognize that, except in a few LATAs that cross state boundaries, most presubscribed access lines cannot complete interstate calls over LEC facilities. Rather, the customers must use the facilities of an IXC.

[63] *Id.* at 3-4. Finally, NYNEX suggests that even if ALC's proposal were acceptable, the LECs would have to recover federal high cost and lifeline assistance costs through their interstate access charges. *Id.* at 5. NYNEX says that the effect of the proposal would simply impose this burden back on all IXCs through usage-sensitive charges, which would be contrary to this Commission's goal of driving usage-sensitive rates closer to their true economic costs. *Id.*; *see also* SWBT Reply at 2-4.

[64] ALC Comments at 2, *quoting Interstate IntraLATA Access Charge Order* at para. 4.

[65] ALC Reply at 2.

[66] *Id.* at 5.

[67] *Notice* at 2043, para. 19.

[68] Our action does not, of course, foreclose ALC or other persons from filing a petition for Rule Making to propose changes in the assessment of high cost and/or lifeline charges that are beyond the scope of this Rule Making.

[69] Pursuant to the Regulatory Flexibility Act (Act), an agency must prepare a regulatory flexibility analysis whenever it publishes general notice of a proposed Rule Making for any proposed rule. The agency is required to describe the potential impact of such a rule on small entities. *See* 5 U.S.C. §§ 601-612 (1982).

[70] *See* LinTel Comments at 5 n. 4, 7.

[71] *Id.* at 7.

[72] *MTS and WATS Market Structure*, 93 FCC 2d 241, 338-339 (1983).

[73] *Id.*

[74] *See* 93 FCC 2d at 338; *See also Mid-Tex Electric Co-op, Inc. v. F.E.R.C.*, 773 F.2d 327, 340-343 (1985).

[75] We note that the *Notice* proposed to reformulate our existing rules for high cost and lifeline funding to correct for unexpected anomolies in their operation commencing April 1, 1989. However, given the timing of this order, for reasons of administrative efficiency, the Bureau granted waiver of these rules to allow IXCs to conform to the corrected proposed rules. No petitions for reconsideration or applications for review of the waiver have been filed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-556

In re Application of

ROCKLEDGE RADIO, LTD.	File No. BPH-861104MB
BEN L. UMBERGER	File No. BPH-861105MB
SHAW ENTERPRISES, INC.	File No. BPH-861105ME
ROCKLEDGE BROADCASTING ASSOCIATES (Limited Partnership)	File No. BPH-861105MF
Michael H. Kahn d/b/a ORION COMMUNICATIONS, LTD.	File No. BPH-861105MH
D.V.R. BROADCASTING (A General Partnership)	File No. BPH-861105MK

For a Construction Permit for a
New FM Station on Channel 274A
at Rockledge, Florida

MEMORANDUM OPINION AND ORDER

Adopted: July 28, 1989; Released: August 7, 1989

By the Review Board: BLUMENTHAL and ESBENSEN.

1. Before the Review Board is a "Supplemental Joint Petition for Approval of Settlement Agreements" filed July 24, 1989, by Rockledge Radio, Ltd. (RRL), and D.V.R. Broadcasting (DVR).

2. By *Memorandum Opinion and Order*, FCC 89R-39, released June 26, 1989, the Board dismissed the then-pending Joint Petition for Approval of Settlement Agreements and For Leave to Amend, as filed by the captioned parties on April 18, 1989 (supplemented May 4, 1989), and directed the parties to file, within 30 days of the release of that *Order*, either (1) a modified settlement agreement, or (2) exceptions to the *Initial Decision*, FCC 89D-14, released April 14, 1989.

3. Our previous action was occasioned by the initial terms of the proposed settlement agreement. As noted in our *Order* (at para. 2), the prior Joint Petition requested that we:

> simultaneously (a) approve the five settlement agreements attached hereto; (b) grant D.V.R. leave to amend its application in order to form a corporation effecting a merger between D.V.R. and RRL; (c) dismiss with prejudice the applications of RRL, Umberger, Shaw, RBA and Kahn; (d) grant D.V.R.'s captioned application (as amended); and (e) terminate this proceeding.
>
> * * *
>
> Taken together, the Agreements provide for the merger of D.V.R. and RRL into a new corporation in which each of D.V.R.'s and RRL's owners will have voting equity; the dismissal with prejudice of the applications of RRL, Umberger, Shaw, RBA and Kahn in exchange for consideration to be paid by D.V.R.; and the assumption by the new corporation of D.V.R.'s obligations to compensate Umberger, Shaw, RBA and Kahn for their dismissal.

4. However, we further observed (*id.*, at paras. 5-9):

> In his conclusions, the ALJ found that Sampson's testimony about how he obtained financing was "incomprehensible and probably untrue" (I.D. at para. 55); that his testimony about the partnership agreement was "generally evasive" (*id.*, at para. 56); that his testimony was unreliable in other respects; and that "overall his untruthful testimony leads to the conclusion that he cannot be counted on to tell the truth about his role in the partnership" (*id.*, at para. 60). In sum, the ALJ concluded that RRL was not entitled to any integration credit "because its principal Charles Sampson does not actually control the partnership and his testimony about his participation is unreliable and untruthful" (*Id.*, at para. 89).
>
> * * *
>
> While the ALJ here made adverse findings about Sampson's honesty without properly adding the requisite character issue, we cannot disregard the ALJ's findings, for "[a]n initial decision is not a mere report to be arbitrarily disregarded. In the absence of review, the initial decision is the decision of the agency." *The Seven Hills Television Company*, FCC 89I-32, released May 1, 1989 at n. 3 (quoting *Stereo Broadcasters, Inc.*, 652 F.2d 1026, 1030 (D.C. Cir. 1981)). Here, and based on the record as reflected in the ALJ's findings and conclusions, we believe that the requisite *prima facie* case for issue enlargement, including the existence of a substantial and material question as to Mr. Sampson's veracity, would seem plainly established, particularly where these findings have not been challenged before the Board.
>
> Having so concluded, and in the absence of exceptions to the ALJ's adverse findings, we could not now approve the proposed settlement which, as noted, incorporates RRL in the proposed grantee, without first remanding the proceeding on the issue delineated above.

5. We further noted that the proposed Settlement Agreement provided that if the Commission should "decline to approve any provision . . . the parties agree to proceed in good faith to resolve" such objections. Thus,

> recognizing the parties' intentions, we point out that we have previously rejected agreements without prejudice to subsequent resubmission after reformation to remove objectionable features. *See Marr Broadcasting Co., Inc.*, 3 FCC Rcd 562 (Rev. Bd. 1988) (principals disqualified for misrepresentation eliminated from ownership interest in revised agreement which is then approved); *Nirvana Radio Broadcasting Corp.*, FCC 89R-25, released April 21, 1989 (Rev. Bd.) (agreement approved subject to modification of provision containing convenant not to compete). And, the parties' attention is particularly directed to *Kannapolis Television Co., A Joint Venture*, 3 FCC Rcd 2676 (1988), where the Commission reversed its earlier denial of a settlement agreement after withdrawal of the principal whose adjudicated misconduct under a character issue had previously rendered the proposed grantee unqualified to be a licensee.

Id., at para. 9. Finally, we raised additional questions concerning the financial viability of the proposed remaining applicant(s), and requested additional financial data (assuming the parties attempted to reform the settlement agreement). *Id.*, at para. 10.

6. Now before the Board is the Supplemental Joint Petition filed by RRL and DVR, which provides that RRL will dismiss its application in consideration of $175,000 to be paid by DVR; that there will be no merger of DVR and RRL into a new entity; that neither RRL nor any of its principals will have any present or future interest in the proposed facility; and that DVR will become the sole permittee. Both parties have submitted the requisite declarations required by 47 C.F.R. §73.3525 (which implements 47 U.S.C. §311(c)(3)), and DVR has submitted an additional financial showing that adequately demonstrates the availability of sufficient funds necessary to carry out the proposed settlement, as well as construction and operation of the proposed new FM facility. In light of the foregoing, we find no remaining impediment to resolution of this proceeding.

7. DVR represents (Supplemental Joint Petition at p. 3) that its previously-executed settlement agreements with Ben L. Umberger, Shaw Enterprises, Inc., Rockledge Broadcasting Associates, and Michael H. Kahn, as well as the declarations (pursuant to 47 C.F.R. §73.3525) submitted therewith, remain in full force and effect.[1] Thus, those agreements will be reinstated.

8. On July 26, 1989, Kahn filed "Contingent Exceptions." Therein, Kahn noted (at footnote 1): "These exceptions are contingent in nature and need be reviewed only if any other party seeks review and no acceptable settlement agreement which Kahn is obliged to support is timely filed." In light of the foregoing, Kahn's "Contingent Exceptions" will be dismissed.

9. ACCORDINGLY, IT IS ORDERED, that the previously-executed agreements referenced, *supra*, para. 7, ARE REINSTATED; and, the previously-submitted Joint Petition for Approval of Settlement Agreements, as it pertains to these referenced applicants, IS GRANTED and those settlement agreements ARE APPROVED; and,

10. IT IS FURTHER ORDERED, That the Supplemental Joint Petition for Approval of Settlement Agreements, filed July 24, 1989, by Rockledge Radio, Ltd., and D.V.R. Broadcasting IS GRANTED; and that settlement agreement IS APPROVED; and,

11. IT IS FURTHER ORDERED, That the Contingent Exceptions of Michael H. Kahn, d/b/a Orion Communications, Ltd., filed July 29, 1989, ARE DISMISSED as moot; and,

12. IT IS FURTHER ORDERED, That the applications of Rockledge Radio, Ltd. (File No. BPH-861104MB); Ben L. Umberger (File No. BPH-861105MB); Shaw Enterprises, Inc. (File No. BPH-861105ME); Rockledge Broadcasting Associates, Limited Partnership (File No. BPH-861105MF); Michael H. Kahn d/b/a Orion Communications, Ltd. (File No. BPH-861105MH) ARE DISMISSED; and the application of D.V.R. Broadcasting (A General Partnership) (File No. BPH-861105MK), for a new FM Broadcast Facility at Rockledge, Florida, IS GRANTED; and,

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] Pursuant to these agreements, DVR proposes to pay Umberger $80,000; Shaw $175,000; Rockledge Broadcasting $175,000; and Kahn $100,000. Thus, the total consideration to be paid by DVR to the five dismissing applicants is $705,000.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-438

In re Applications of

PORT HURON FAMILY RADIO, INC. — File No. BPH-830325AE

L & K BROADCASTING, INC. — File No. BPH-830714AC

For Construction Permit for a New FM Station at Port Huron, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: July 28, 1989; Released: August 7, 1989

By the Review Board: BLUMENTHAL and ESBENSEN.

1. Before the Review Board is a styled "Petition for Reconsideration" filed July 24, 1989 by L&K Broadcasting, Inc. (L&K), seeking "reconsideration" of the Board's *Memorandum Opinion and Order*, FCC 89R-45, released July 19, 1989.

2. In that *Order*, the Board denied the captioned parties Joint Petition For Approval of Settlement and Other Relief (as filed June 16, 1989, and supplemented June 19, 1989). Therein, we observed that while the Joint Petition otherwise met the requirements of Section 73.3525 of the Commission's Rules, 47 C.F.R. §73.3525, governing settlement agreements (which rule implements the Communications Act of 1934, as amended, 47 U.S.C. §311(c)(3)), we could not grant the settlement as proposed because the Joint Agreement would permit L&K, pursuant to a "right of prior refusal," to "enjoy the potential opportunity of coming into possession of the facility, even though it, like [Port Huron Family Radio, Inc.], was found lacking the basic qualifications to be a Commission licensee." *Order*, at para. 4.

3. Now, however, L&K has submitted a "Renunciation of Rights Under Paragraph 5 of Settlement Agreement," executed by Kenneth A. Monicatti on July 24, 1989, which states as follows:

> I, Kenneth A. Monicatti, Secretary-Treasurer of L&K Broadcasting, Inc. ("L&K"), hereby renounce and forever disclaim entitlement to any rights of prior refusal and any rights to prior notice of the Port Huron FM station sale and license or construction permit transfer or assignment conferred upon L&K by paragraph 5 of the Settlement Agreement executed by Martin Doorn of Port Huron Family Radio, Inc. and myself on June 6, 1989.

4. In light of the foregoing, we perceive no remaining legal impediment to grant of the proposed settlement agreement, resulting solely in the dismissal of L&K's pending application. As we noted in our *Order* :

> . . . had the proposed settlement agreement been limited to providing for L&K's dismissal solely in consideration for the monetary sum specified, we would have little pause in approving the proposal. That is, the applicants . . . have submitted declarations, under penalty of perjury, stating that their applications were not filed for the purpose of reaching or carrying out a settlement, and they have demonstrated that the public interest would be served by reducing the number of competing applicants (thereby conserving the time and resources of the Commission and the parties). Moreover, under present Commission policy, there would be no impediment to the mere dismissal of L&K's application because the *quid pro quo* would not be a grant of Family's application (because, as noted, Family has been found unqualified to be a licensee). *See Webster - Fuller Communications Associates*, FCC 89-189, released June 19, 1989 (Commission approves settlement dismissing two applicants where settlement not dependent on grant of third applicant which has basic qualifications issues outstanding against it) . . . .

And, as we further opined (*id.*, at n. 4):

> The fact that L&K's application was denied by the Board is also not a bar to its proposed dismissal. The *Webster - Fuller* Commission in fact reinstated an applicant previously dismissed for lack of a transmitter site, so that it could participate in the settlement; and, Commission policy permits applicants with unresolved character allegations against them to withdraw their applications pursuant to settlement agreements. *Allegan County Broadcasters, Inc.*, 83 FCC 2d 371 (1980).

5. Port Huron Family Radio, Inc. (Family) was similarly disqualified in our *Decision*, 4 FCC Rcd 2532 (Rev. Bd. 1989). However, it has filed an Application for Review with the Commission; and whether or not it ultimately becomes the permittee of the subject facility depends upon the outcome of its appeal. Nothing in our action here suggests that Family is qualified to become a licensee, and its payoff of L&K is taken at its own risk. With that understanding, we interpose no objection to L&K's dismissal, or to Family's payoff, or the exercise of its statutory appeal rights. *Hals und Beinbruch* !

6. Therefore, we will reinstate the Joint Petition of the parties filed June 16, 1989, as supplemented June 19, 1989, and July 24, 1989, and approve the relief requested.[1]

7. ACCORDINGLY, IT IS ORDERED, That the Joint Petition For Approval of Settlement and Other Relief filed June 16, 1989, as supplemented June 19, 1989, and modified by the "Renunciation of Rights" filed July 24, 1989, IS REINSTATED; and,

8. IT IS FURTHER ORDERED, That the "Petition for Reconsideration" filed July 24, 1989, by L & K Broadcasting Inc., IS GRANTED to the extent indicated herein; and that the Joint Petition for Approval of Settlement and

Other Relief, filed June 16, 1989 (as supplemented June 19, 1989) by Port Huron Family Radio, Inc. (File No. BPH-830325AE), and L&K Broadcasting, Inc., as additionally supplemented July 24, 1989, IS GRANTED; the settlement agreement IS APPROVED; and the application of L&K Broadcasting, Inc. (File No. BPH-830714AC) IS DISMISSED; and,

9. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed April 24, 1989, by L&K Broadcasting, Inc., IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] Pursuant to that agreement, Family proposed to pay L&K a total of $75,000 "not conditional upon grant of Family's application," and L&K would dismiss its application. *Order*, at para. 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-349

In the matter of

Amendment of Part 2 of the rules
concerning the importation of
radio frequency devices capable of
causing harmful interference

NOTICE OF PROPOSED RULE MAKING

Adopted: July 25, 1989; Released: August 7, 1989

By the Commission:

INTRODUCTION

1. The Commission institutes this proceeding to update its rules covering the importation of radio frequency (RF) devices capable of causing harmful interference and to eliminate burdensome and duplicative government information filing requirements. These changes will facilitate the U.S. Customs Service (Customs) Day One project to implement an automated paperless entry system and more closely match the Commission's rules with the separate requirements of the Telecommunications Trade Act of 1988.

BACKGROUND

2. The Commission's rules covering the importation of RF devices are contained in Subpart K of Part 2. They were first adopted in Docket No. 20194 on December 10, 1975 as the result of a joint effort by Customs and the Commission. *In the Matter of Amendment of Part 2 with respect to importation of certain electronic equipment*, FCC 75-1352, 41 *Fed. Reg.* 25902, 59 FCC 2d 1083 (1976) (hereafter cited as *Original Report and Order)*. Their purpose is to keep devices which do not comply with our technical requirements from being distributed to the general public, thereby reducing the potential for harmful interference being caused to authorized radio communications. These rules were adopted after experience indicated that marketing regulations contained in Subpart I of Part 2, which prohibit the importation of noncompliant devices, had been widely ignored. They require the importer or consignee to complete and associate an FCC Form 740 with each RF device, or subassembly thereof, which is imported into the United States. The form requires the importer or consignee to determine and declare that the RF devices being imported comply with the Commission's technical requirements. It also requires specific information about the devices being imported, such as manufacturer and model number, that allows them to be screened for compliance.

3. During the first several years of implementation, Form 740's were only required to accompany the device being imported; that is, accompany the entry papers associated with the imported devices. Customs would receive the forms, review them for completeness and ascertain the conditions of importation. The forms were then sent to the Commission for review. As a result of requests from the Commission, as well as the conditions of import, Customs would again become involved in redelivery actions for noncompliant devices, make necessary charges to importation bonds, and provide other follow-up assistance. This assistance was provided by Customs under a reimbursable agreement with the Commission.

4. By *Order* released May 28, 1981, the Commission temporarily waived, due to budgetary reasons, the rules requiring importers of RF devices to attach Form 740 to Customs entry papers. *In the Matter of Relaxation of Rules Adopted in Final Rule Concerning Importation of Certain Electronic Equipment*, FCC 81-249, 46 *Fed. Reg.* 31414 (1981). This waiver was effective from May 31, 1981 through September 30, 1981.

5. By *Order* adopted September 30, 1981, the Commission modified its rules to require Form 740 be sent directly to the Commission rather than presented to Customs and forwarded subsequently. *In the Matter of Frequency Allocation and Radio Treaty Matters; General Rules and Regulations; Amendment of Rules Pertaining to Form 740*, FCC 81-434, 46 *Fed. Reg.* 52365 (1981). The original of the completed form was to be sent on or before the time shipments were delivered to U.S. ports of entry. A copy was required to remain with the Customs entry papers for inspection by authorized personnel, but there was no direct Customs role in reviewing or processing the forms.

6. A number of changes in the import industry have affected the Form 740 program. First, the average quantity of forms being filed have increased from approximately 3,000 per month in 1977 to over 30,000 per month in 1988. This is likely due not only to more imported goods being sold in the U.S.A., but also to the greater variety of consumer products which fall under the broad definition of an RF device (or subassembly thereof). The growing industry burden of gathering the necessary information and transferring it to paper forms has caused several importers and customs brokers to informally request changes in the way Form 740 information is submitted.

7. The amount of work required by Commission staff to ensure that forms are being filed and to open, handle, and store the forms has grown dramatically. Budget restrictions during recent years have mandated severe cutbacks in the resources available for these activities.

8. The information on Form 740 is largely duplicative of that already collected on Customs Form 3461 (Entry/Immediate Delivery) and Customs Form 7501 (Entry Summary). Customs has undertaken the Day One project to automate its importation entry process. It envisions the total elimination of paperwork for most importation actions. Customs has informally requested that the Commission eliminate the requirement for filing copies of Form 740 with Customs papers. In return, they have offered to gather FCC information through their entry and entry summary processes, and to provide all Form 740 information back to the Commission.

9. Importers and brokers, as well as Customs and the Commission, are using computers to gather and track information about imports. Current computer technology would easily allow Form 740 information to be submitted and processed electronically.

PROPOSED CHANGE

10. We are, therefore, proposing that the requirement for completing and filing a paper Form 740, as well as the requirement for filing Form 740 information directly to the Commission, be eliminated. All Form 740 information will instead be required to be provided directly to Customs, preferably electronically. We will rely on Customs to gather and provide the information to us so that we can continue our efforts to keep noncompliant RF devices from being distributed to the general public. The justification for this proposal is threefold: it will relieve the industry of a significant and duplicative regulatory burden without compromising our abilities to limit the importation of noncompliant RF devices; it will allow Customs to move from a paper system to an automated system; and, it will allow the Commission to spend its limited resources on the most productive and important aspects of the program.

11. In response to informal industry requests, we are also proposing a general updating of the rules to reflect current or desired procedures and practices. The proposed changes will eliminate unnecessary filing requirements for more than 40% of all entries currently covered, and clarify confusing requirements in others.

DISCUSSION

12. *Filing Form 740 Information.* Importers, usually through their Customs brokers, are currently required to file information with Customs in order for products to be imported. Likewise, the importers or consignees must file FCC Form 740 with both the Commission and Customs. Under this proposal, importers, consignees, or their brokers would file FCC Form 740 information directly with Customs, either through the Automated Broker Interface (ABI) which allows the entry of information electronically into Custom's comprehensive Automated Commercial System (ACS) database, or with Customs entry and entry summary paper forms. Paper filings would at least initially continue to be made by attaching FCC Form 740 to Customs documentation. Information gathered by Customs, either electronically or on paper, would be made available to the Commission for use in monitoring the importation of RF devices.

13. ACS was developed as a comprehensive tracking system by Customs. It merges several previously separate automated systems and facilitates many aspects of the importation process. With their Day One project, Customs is attempting to reduce paper filings by encouraging the filing of necessary information through the ABI. This eliminates the handling of significant amounts of paper and eases the burden associated with entering the paper information into ACS. Customs brokers and importers receive a quicker release of imported goods and save resources by allowing their own computer systems to communicate directly with Customs. Our requirement for filing a paper copy of Form 740 with Customs essentially prohibits the use of paperless ABI entries for RF devices. The proposed rules would greatly expand the potential use of such paperless ABI entries.

14. Customs does not currently gather all FCC Form 740 information. They do not collect the FCC identifier (when appropriate), model or type number, trade name, or equipment description. In addition, the quantity on Form 7501 is required to be in HTS[1] units which serve as a basis for assessing duties or determining quotas. In certain situations, HTS units may be based on weight or not required and, as such, may not be comparable to the quantity or total number of items which the Commission requires on Form 740. Finally, Customs does not require a declaration, as is contained in Part II of Form 740, of the terms or conditions under which the RF devices are being imported. Under this proposal, Customs will gather this information for the Commission in addition to that which they already collect.

15. The precise manner in which the necessary FCC information will be filed electronically with Customs has yet to be determined. Specific details are being discussed with Customs, and by Customs with their ABI brokers. Customs is required by their agreement with ABI brokers to provide at least 90 days notice prior to making changes such as this. Accordingly, adequate advance notice of the precise filing requirements and procedures will be provided so that the industry can plan for the transition.

16. We anticipate that the Form 740 information which is not currently collected by Customs will be required to be submitted as separate data elements with both the Customs Form 3461 and Form 7501 filings. Trade name, model or type number, and other descriptive information will be included in an FCC commercial description of merchandise. The actual quantity of each device imported, regardless of the HTS units, will be required as an FCC quantity. A declaration will be required of the terms under which the devices are being imported. This declaration will correspond with the checking of a box in Part II of the current Form 740, and will consist of a two digit number as specified in the proposed rules. Finally, the FCC Identifier must be reported if the device has an FCC equipment authorization. All of this information will be required to be filed with the Customs entry information (now contained in Form 3461) prior to actual entry. As is typical for most Customs-submitted information, it will be filed again along with any changes with the Entry Summary information (currently on Form 7501).

17. The current Form 740 requires that the importer or consignee sign the form and declare the terms under which import of the devices is permitted. While a signature will no longer be required for electronic filings, the act of submitting necessary FCC information to Customs will be considered a declaration of the terms of importation and a certification that the product conforms to all applicable rules and regulations of the Commission. Any person who knowingly makes a false declaration may be fined or imprisoned pursuant to 18 U.S.C. section 1001. Failure to provide the necessary or correct FCC information can as well result in an administrative fine, refused entry, refused withdrawal for consumption, required redelivery to the Customs port, and other administrative, civil, and criminal penalties provided by law.

18. *Filing Requirements.* In addition to allowing the electronic filing of Form 740, we are also eliminating requirements to file Form 740 information in circum-

stances where either the RF device has little chance of being distributed to the general public or where it has little potential for causing harmful interference.

19. The current Form 740 filing requirement applies to subassemblies of RF devices. Even though we defined "subassembly" in a note following Section 2.1201(b), changes in the way products are manufactured has resulted in confusion about what is and is not a subassembly, and therefore when a Form 740 must be filed. To clarify the requirements, we are proposing to delete the reference to subassemblies and instead require Form 740 be filed only for entries of complete or essentially complete RF devices. This was our original intent.[2] The Commission has no technical standards for subassemblies. Instead, the technical requirements apply to the completed product. In addition, subassemblies cannot be operated and thereby cause harmful interference unless they are installed within an RF device. Finally, most subassemblies have little chance of reaching the general public. An obvious exception is personal computer circuit boards and power supplies. In any case, it was our original intent to limit the filing requirement to essentially complete RF devices and we find no need for requiring Form 740 information be filed for subassemblies in general.

20. By eliminating the requirement to file Form 740 information for subassemblies, we are also eliminating a current problem: distinguishing between a subassembly and a part or component (for which Form 740 is not required). Because of this confusion, many importers are filing and Customs representatives requiring Form 740 for parts imports. The elimination of filing requirements for subassemblies should result in the reduction of Form 740 filings by 40%, removing a substantial burden from both the public and the Commission.

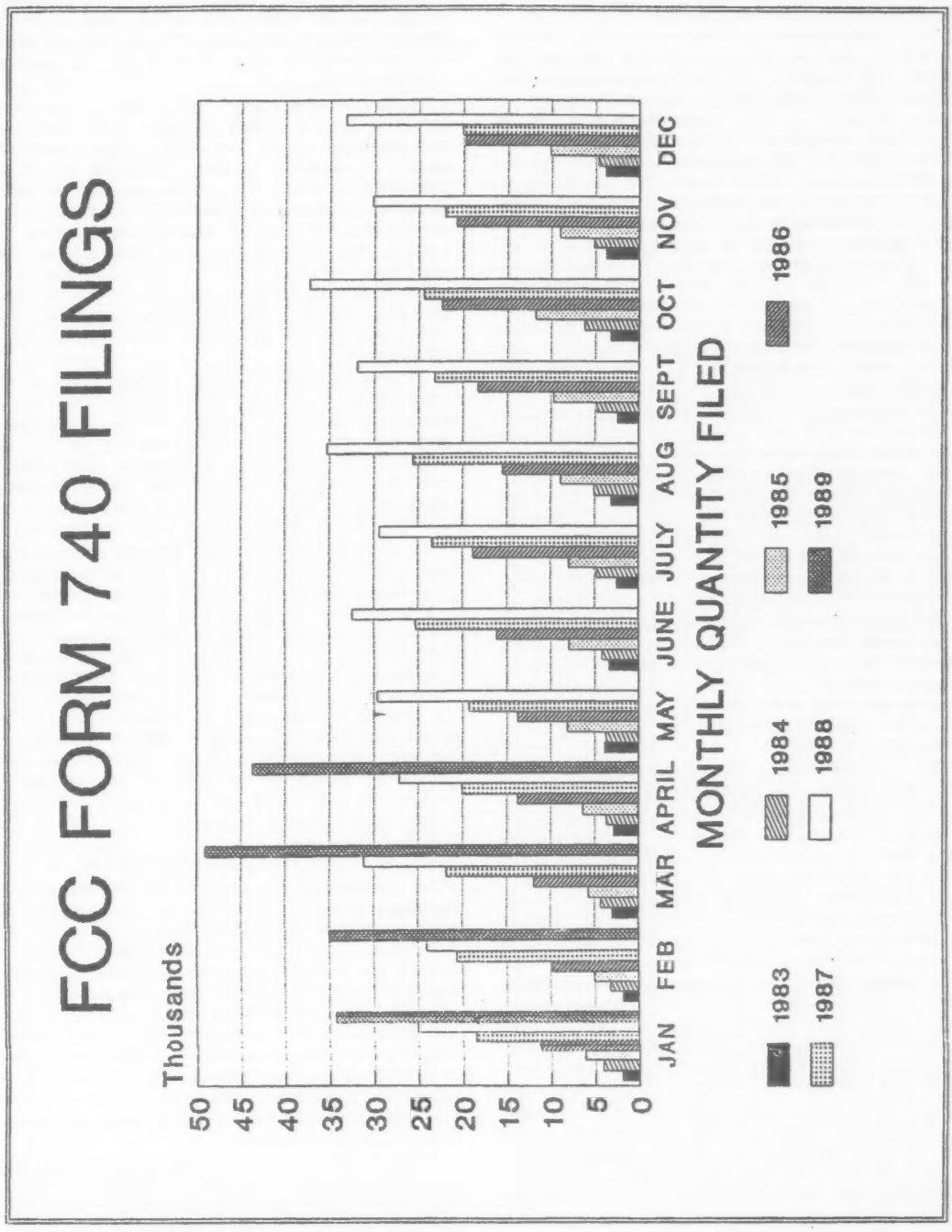
21. As discussed in paragraph 2 above, the rules requiring the filing of Form 740 are intended to avoid potential harmful interference from being caused by devices which do not comply with the Commission's technical regulations. With the proliferation of computer microprocessor technology over the past several years, a number of products are included in the current definition of an RF device but have little chance of causing harmful interference. The current rules are overbroad in including such devices under the Form 740 program. The proposed rules parallel exemptions of our technical requirements provided under Part 15 of the rules.

22. *Effect of Changes*. The current FCC Form 740 program places a burden on the public of an estimated 35,000 hours per year. We expect that over 14,000 burden hours per year will be saved by eliminating filing requirements for subassemblies, and an additional 10,500 burden hours per year will be saved by allowing electronic filing. Annual postage costs to the public, currently estimated at $63,000, would be totally eliminated.

23. In addition to savings for the industry, the Commission's workload would be positively affected by this change. We are currently receiving 35,000 Form 740's per month. Each year our Field Operations Bureau expends approximately one workyear opening, handling, processing, and storing the forms. Additional resources are expended within the Commission's mailroom for handling this significant volume of mail and within the Commission's print shop for printing the forms. Due to the dramatic increase in forms being filed (see Figure 1 below) and the continuing budgetary restrictions on the Commission, resources which more properly should be spent analyzing the information on the forms have instead been used for opening, handling, and storing them. Eliminating the requirement for filing Form 740 with the Commission will free up resources for doing the more productive and important work of screening imported RF devices for compliance with our technical regulations. By using ACS information, we should be able to do so more quickly and accurately than is currently possible.

24. *Trade Act Requirements*.The Telecommunications Trade Act of 1988 (Trade Act) has a direct impact upon the filing of Form 740 information. It specifies that any foreign product subject to registration or approval by the Commission may be entered into the U.S. only if the product conforms with all FCC rules and regulations and if the information required on Form 740 as of the date of enactment is provided to Customs at the time of entry.[3] The Form 740 information is to be provided in such form and manner as the Secretary of the Treasury specifies. Although the Commission's rules have required the filing of this information for over ten years, the Trade Act has caused Customs to take an active role again in collecting the Form 740's. In addition, the Trade Act specifies that Customs will provide an annual report to Congress summarizing the Form 740 filings. The Trade Act requirements are based on trade concerns. Our requirements are based on radio frequency interference concerns. As such, our needs and uses of Form 740 may differ from those of the Trade Act.

25. The Trade Act appears to use standards somewhat different from those in the Commission's existing rules for determining when Form 740 information must be filed. For example, the Trade Act requires the filing of information if the product is subject to approval by the Commission. Our current rules, however, require the filing of Form 740 information for RF devices regardless of whether they need approval. Sections 4(i), 302, and 303(r) of the Communications Act of 1934, as amended (Communications Act), provide our authority for promulgating these rules. They authorize the making of reasonable regulations governing the interference potential of devices. We require certain devices to have Commission approval; other devices do not require approval. In either case, most devices must comply with technical regulations intended to limit their potential for causing harmful interference. Examples of devices not requiring approval include certain computers and other products containing computer technology, and AM, FM, TV, and other receivers. Our import rules were established after we found many devices being imported simply did not comply with technical requirements. To make an FCC Form 740 filing, the importer or consignee must determine that the devices do comply with technical requirements. We believe this step is needed and will continue to require the filing of Form 740 information for RF devices which do not require approval.


FCC FORM 740 FILINGS
Thousands
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26. The Trade Act would, on the surface, seem to require the filing of Form 740 information for all devices which require FCC registration; that is, devices which connect to telephone lines. However, the Commission rules require the filing only when a telephone device contains a computer microprocessor or other circuitry which makes it also an RF device. Form 740 is entitled "Statement Regarding The Importation of Radio Frequency Devices Capable of Causing Harmful Interference" and requires a declaration of the conditions under which the devices comply with FCC technical regulations governing interference potential. This declaration could not be made for a telephone device which is not also an RF device. There is no potential for a telephone device to cause harmful RF interference. For these reasons, we do not believe it appropriate to modify our rules to require FCC Form 740 information be filed for telephone devices which aren't also RF devices. Since the filing of such information was not required on the date of enactment of the Trade Act, as it specifies, it is possible that the Trade Act makes no such requirement either. In any case, the Trade Act places upon Customs the burden of interpreting and enforcing its provisions.

27. We are proposing to adopt one aspect of the Trade Act into our new rules: we will require the filing of Form 740 information only for foreign-manufactured or foreign-modified products. We currently require Form 740 information for RF devices regardless of where they were manufactured. However, when RF devices are manufactured in the U.S. we have the ability to deal directly with the manufacturers if problems arise. Accordingly, we see no need to include under these requirements U.S. manufactured goods which are returned.

28. *Additional proposed changes*. Current Commission rules and Form 740 instructions require that the form be completed by either the importer or consignee. However, as a practical matter, customs brokers routinely file both Customs paperwork and Form 740's for their clients. The rule changes would clearly permit Customs brokers to file this information.

29. The existing rules allow for the importation, in specific circumstances, of devices which do not comply with the Commission's technical regulations. Noncompliant devices, in most cases, must be entered under a bond which ensures that certain steps will be taken by the importer either to modify the equipment prior to sale in the U.S.A., or to ensure that it is not marketed or used in the U.S.A. Customs already requires that imports be covered by bonds. We do not believe that a duplicative Commission requirement for bonds is necessary. In addition, our rules require the filing of special information with the appropriate District Director of Customs in certain instances. This serves little purpose and, according to Customs, is no longer practical. We are, therefore, proposing to replace these requirements with one requiring the ultimate consignee to provide, upon request, documentation to show that the terms of condition for entry were complied with. We believe this is far less burdensome than the existing requirements. At the same time, we are also going to somewhat restrict the circumstances under which noncompliant devices can be imported.

30. We will no longer allow the importation of RF devices which have an equipment authorization pending before the Commission. It has been our experience that many applications for equipment authorization are being denied because the equipment is not compliant with our technical regulations. In addition, conditions are often placed on equipment authorizations requiring the equipment to be modified prior to marketing. Because these devices can too easily become available to the public without ever complying with the technical regulations, we will now require issuance of the equipment authorization prior to entry.

31. We are also going to eliminate the current provisions of §2.1219 which generally allow the entry of noncompliant devices or devices about which the importer or consignee possess insufficient information to determine its compliance. These entries are permitted under our current rules provided a bond is obtained and reports made to Customs showing that the devices are brought into compliance before they are marketed or otherwise disposed of. Customs procedures do not accommodate such reporting and, lacking it, there is no reasonable assurance that devices entered under this condition would ever be brought into compliance before being marketed.

32. The changes described in paragraphs 30 and 31 affect less than 1% of Form 740 filings. However, because the total number of products imported can be enormous, we believe that the risk of noncompliant devices reaching the public is too great to continue to allow entry under these circumstances. Noncompliant and questionable devices will still be permitted to be imported in limited quantities for evaluation, testing, or demonstration.

33. Section 2.1213 of the existing rules permits an individual entering the U.S.A. with not more than three receivers to declare, in lieu of certifying compliance, that the receivers are for personal use and are not intended for sale. Customs is permitted to waive our requirement for filing a Form 740 in this circumstance. We are proposing to expand this exemption to allow the importation for the importer's or consignee's own use, personal or not, of up to three of any unintentional radiators as defined in Section 15.3 of the rules. The importer or consignee must declare that the devices are for their own use and they will not be offered for sale or otherwise marketed in the U.S.A.

34. Section 2.1215 currently permits RF devices or subassemblies to be imported for the express purpose of repair or further fabrication, provided the completed device or subassembly is exported. Several parties have requested permission, when importing devices for repair, to ship replacement devices from stock and to return the imported items back to stock after repair. We are proposing Section 2.1215 be amended to permit this practice for items imported for repair provided the device will not be offered for sale or otherwise marketed in the U.S.A. unless it complies with applicable FCC technical regulations and an equipment authorization, if required, is obtained. The provision for importing subassemblies for further fabrication is no longer necessary.

35. Form 740 will need to be modified to reflect whatever changes are adopted.

36. In order to ensure that the actual devices entering the country are as described in the Customs filings and are in compliance with both our technical regulations and the conditions for import, we are proposing a rule clearly authorizing the examination, inspection, and testing of imported devices and the examination of related documents. This may include, when appropriate, submission of samples of the imported devices to the Commission's

Laboratory for testing. We believe our existing authority already allows such testing, but are now putting such a requirement into the rules. We will also require importers to be able to provide, upon request within one year of the date of entry, information on how they determined that the devices were compliant with Commission requirements.

37. We wish to make it perfectly clear that the importation of noncompliant devices, regardless of whether the required FCC information is filed, is strictly prohibited except in very limited situations. The manufacture, import, sale, offer for sale, shipment, or use of noncompliant RF devices violates 47 U.S.C. section 302(b). Noncompliant equipment can be refused entry or required to be redelivered after entry, can be seized and forfeited to the government, or can be subject to other sanction actions as provided by federal law.

38. Section 503(b) of the Communications Act gives the Commission authority to issue monetary forfeitures for violations of either its rules or the Act. Administrative forfeitures for willful or repeated violation of marketing or import regulations are limited to $2000 per violation per day, or a total of $5000. We do not believe these amounts are adequate to deter the importation or marketing of RF devices which do not comply with our technical regulations. Accordingly, we will be proposing to Congress that these limits be raised.

39. The Commission currently provides public access to Form 740's which are filed except in very limited circumstances.[4] We will no longer have such records available. However, Customs will periodically provide us with the information which is filed. We intend to continue to make such information as is contained on Form 740 available to the public. We anticipate the information will be available through the Commission's contractor for public records duplication. In addition, summary reports required to be prepared by Customs under the Trade Act should be available from Customs. Because there is no easy mechanism for handling Section 0.459 requests to withhold certain information that is filed, all information will be made publicly available. Comments concerning this proposal or possible alternatives are welcome.

EX PARTE CONSIDERATIONS

40. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised the *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

41. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

42. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's initial analysis is as follows:

I. *Reason for Action*

This action is taken to update rules established 14 years ago and to eliminate burdensome and duplicative government information filing requirements.

II. *Objectives*

The purpose of these changes is to continue to keep RF devices which do not comply with our technical requirements from being distributed to the general public, thereby reducing the potential for harmful interference being caused to authorized communications. These changes will facilitate the Customs Day One project to implement automated paperless entries, will allow the Commission to expend its resources in a more efficient and effective manner, is responsive to industry requests to relieve the significant burden imposed by the current requirements, and is responsive to the Telecommunications Trade Act of 1988.

III. *Legal Basis*

The actions taken by the *Notice* are authorized by sections 4, 302, and 303 of the Communications Act of 1934, as amended.

IV. *Description, Potential Impact and Number of Small Entities Affected*

This Notice of Proposed Rule Making eliminates the requirement for filing Form 740 information directly with the Commission. Instead, importers would be required to file FCC information with their Custom entry and entry summary documentation. It is unlikely that this change would in any way adversely affect small importers. Instead, it would provide them with more efficient ways of conducting their business and allow them to eliminate duplicate filing of information with the government. In addition, we are reducing filing requirements, eliminating unnecessary requirements and, at the same time, somewhat limiting the circumstances under which noncompliance devices can be imported. Overall these changes should significantly reduce the current regulatory

burden on both small and large entities. Comments, however, on any potential adverse effects on small businesses are solicited.

V. ***Reporting, Record Keeping and Other Compliance Requirements***

There is no change in the amount of information to be collected for each entry of radio frequency devices.

VI. ***Federal Rules which Overlap, Duplicate or Conflict with this Rule***

None

VII. ***Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives***

Although the filing of FCC information with Customs through the ABI is encouraged, the Commission will continue to allow the filing of paper-based information with Customs. It is expected that small importers and brokers will be the primary users of paper filings. However, given the decreasing costs associated with automation, it is expected that many small importers and brokers will take advantage of the ABI filing procedures.

PAPERWORK REDUCTION ACT CONSIDERATIONS

43. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to decrease the information collection burden which the Commission imposes on the public. This proposed reduction in information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

NOTICE AND COMMENT PROVISIONS

44. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **September 28, 1989,** and reply comments on or before **October 13, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Docket Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

45. A copy of this Notice will be sent to the U. S. Customs Service soliciting their comments. Implementation of these changes is contingent upon the Commission and Customs reaching mutual agreement on how they are to be implemented.

46. Regarding questions on matters covered in this document, contact Richard Engelman, 202-632-6345.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 2 of the Commission's rules is proposed to be amended as follows:

1. The authority citation for Subpart K of Part 2 is revised to read as follows:

Authority: 47 U.S.C. 154(i), 302, and 303(r)

2. Section 2.1201 is amended by revising paragraph (b), removing the note following paragraph (b), and revising paragraph (c) to read as follows:

§2.1201 Purpose.

* * * * *

(b) The rules in this subpart set out the conditions under which radio frequency devices as defined in §2.801 that are capable of causing harmful interference to radio communications may be imported into the U.S.A.

(c) The term radio frequency device as used in this subpart shall not include subassemblies, parts, or components of radio frequency devices unless they constitute an essentially completed device which requires only the addition of cabinets, knobs, speakers, or similar minor attachments before marketing or use.

3. Section 2.1202 is revised to read as follows:

§2.1202 General requirement for entry into the U.S.A.

(a) No radio frequency device may be imported into the Customs territory of the United States of America unless the importer or ultimate consignee, or their designated customs broker, determines and certifies pursuant to §2.1202(b) that the entry meets one of the conditions for entry set out in this subpart.

(b) The certification shall consist of the submission to the U.S. Customs Service with both the required entry and entry summary documentation of a completed FCC Form 740. Once instructions are issued on how to file Form 740 information electronically or by using Customs paper forms, the following Form 740 information may be submitted in lieu of Form 740 itself:

(1) the terms under which the device is being imported. as indicated by citing the import condition number specified in §2.1203 et seq.;

(2) the FCC identifier as specified in §2.926, if the device has been granted an equipment authorization;

(3) the quantity of devices being imported, regardless of what unit is specified in the Harmonized Tariff Schedule of the United States; and

(4) a commercial product description, including trade name, model or type number, and other descriptive information about the device being imported.

(c) A separate certification shall be used for each line item in the entry or entry summary containing an RF device, or for each different RF device within a line item when the elements of the certification are not identical.

(d) Failure to properly certify an entry of RF devices may result in refused entry, refused withdrawal for consumption, required redelivery to the Customs port, and other administrative, civil and criminal remedies provided by law.

(e) Whoever makes a certification pursuant to §2.1202 (b) must provide, upon request within one year of the date of entry, documentation on how an imported RF device was determined to be in compliance with Commission requirements.

(f) Excluded from the certification requirement in §2.1202 (a), but not from compliance with all other Commission regulations, are the following devices:

(1) Cameras, musical greeting cards, quartz watches and clocks, modules of quartz watches and clocks, hand-held calculators and electronic games, and other similar unintentional radiators which utilize low level battery power and which do not contain provisions for operation while connected to AC power lines.

(2) Unintentional radiators which are exempted from technical standards and other requirements as specified in §15.103.

(3) Radio frequency devices which were manufactured or assembled in the U.S.A. and which have not been modified or received further assembly.

4. Section 2.1203 is revised to read as follows:

§2.1203 Importation when equipment authorization is required.

A radio frequency device for which a grant of equipment authorization from the Commission is required may be imported provided the appropriate equipment authorization has been issued and the device complies with all terms of that authorization and all applicable Commission technical regulations (Import Condition #1).

5. Section 2.1205 is revised to read as follows:

§2.1205 Importation when equipment authorization is not required.

A radio frequency device for which the Commission has established technical regulations, but for which a grant of equipment authorization from the Commission is not required, may be imported provided the device complies with those regulations (Import Condition #2).

6. Section 2.1207 and its heading are revised to read as follows:

§2.1207 Importation for evaluation, testing, or demonstration.

A radio frequency device may be imported in limited quantities for the purpose of evaluation, testing to determine compliance with pertinent technical regulations, or for demonstration at industry trade shows, provided that the device will not be offered for sale or otherwise marketed (except as permitted in §2.803, §2.806, or §2.809) unless it complies with applicable Commission technical regulations and an equipment authorization, if required, is obtained (Import Condition #3). The ultimate consignee must provide, upon request, documentation to show that the terms of this condition were complied with for any device imported under this condition.

7. Section 2.1209 is revised to read as follows:

§2.1209 Importation for export.

A radio frequency device may be imported solely for export provided the device will not be offered for sale or otherwise marketed for use within the U.S.A. (Import Condition #5). The ultimate consignee must provide, upon request, documentation to show that any device imported under this condition is either still in their possession or has been exported.

8. Section 2.1211 is revised to read as follows:

§2.1211 Importation for Federal Government use.

A radio frequency device may be imported for use exclusively by the U. S. Government or an agency thereof (Import Condition #6). The ultimate consignee must provide, upon request, documentation to show that any device imported under this condition was delivered to the U.S. Government or an agency thereof.

9. Section 2.1213 is revised to read as follows:

§2.1213 Entry for personal use.

An importer or ultimate consignee importing not more than three unintentional radiators as defined in §15.3 may, in lieu of certifying compliance, certify that the devices are for their own use and will not be offered for sale or otherwise marketed within the U.S.A. (Import Condition #7). The U.S. Customs Service may waive the requirement of §2.1202(b) for making a submission of FCC Form 740 information for such entries. The ultimate consignee must provide, upon request, documentation to show that any device imported under this condition is still in their possession.

10. Section 2.1215 and its heading are revised to read as follows:

§2.1215 Importation for repair.

A radio frequency device may be imported for repair provided the device will not be offered for sale, marketed, or used unless and until it complies with applicable Commission technical regulations and an equipment authorization, if required, is obtained (Import Condition #8). The ultimate consignee must provide, upon request, docu-

mentation to show that the terms of this condition were complied with for any device imported under this condition.

11. Section 2.1219 is revised to read as follows:

§2.1219 Non-complying equipment.

A radio frequency device which does not comply with the applicable provisions of this chapter or about which the importer and ultimate consignee lacks sufficient information to certify compliance shall be refused entry or withdrawal for consumption into the Customs territory of the U.S.A.

12. Section 2.1221 is added to read as follows:

§2.1221 Examination of imported equipment.

In order to determine compliance with its regulations, Commission representatives may examine or test any radio frequency device that is imported. If such radio frequency device has already entered the U.S., the ultimate consignee or subsequent owners of that device must, upon request within one year of the date of entry, make that device available for examination or testing by the Commission.

FOOTNOTES

[1] Harmonized Tariff Schedule of the United States.

[2] *See Original Report and Order*, supra., at para. 25.

[3] Public Law 100-418, section 1380.

[4] Section 0.459 of the rules permits any person submitting information to the Commission to request that it not be made routinely available to the public. Only one company has made such requests. Information related to the quantity of devices being entered and the manufacturer's name and address were allowed to be withheld.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, INC. File No. BRCT-871221KE

For Renewal of License of Station
WWOR(TV), Secaucus, New Jersey

and

GARDEN STATE BROADCASTING, LIMITED PARTNERSHIP File No. BPCT-871223KG

and

WHITELY COMMUNICATIONS File No. BPCT-880321KM

For Construction Permit
Secaucus, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: July 27, 1989; Released: August 7, 1989

By the Commission:

1. On January 27, 1989 Whitely Communications filed a request to disqualify Administrative Judge Richard L. Sippel from further presiding over this comparative renewal proceeding. That request was denied by the ALJ by *Memorandum Opinion and Order*, FCC 89M-607, released February 22, 1989. Whitely then filed exceptions to the ALJ's denial, and the ALJ certified the disqualification question to the Commission for its determination by *Order*, FCC 89M-749, released March 9, 1989.

2. In addition to the disqualification question, there are also before us the following matters: (a) a Motion for Acceptance of Appeal, Appeal, and Petition for Stay filed December 27, 1988 by Whitely; (b) a Consolidated Opposition to those pleadings filed January 5, 1989 by the Mass Media Bureau; (c) Oppositions to the Motion for Acceptance of Appeal and to the Appeal and a Motion to Dismiss Petition for Stay or, in the alternative, an Opposition to the Petition for Stay filed January 6, 1989 by WWOR-TV, Inc.; (d) a Consolidated Reply to the above pleadings of WWOR-TV, Inc. filed January 17, 1989 by Whitely; (e) a Reply to the Bureau's Consolidated Opposition to the Motion for Acceptance of Appeal, Appeal and Petition for Stay filed January 17, 1989 by Whitely; and (f) a Motion for Expedited Review filed March 6, 1989 by WWOR-TV, Inc. These pleadings are directed to an interlocutory action by the ALJ which added a financial qualification issue and a related certification issue against Whitely. *Memorandum Opinion and Order*, FCC 88M-3567, released October 25, 1989.

3. In requesting the ALJ to disqualify himself, Whitely alleged that the ALJ had taken a series of actions and inactions in interlocutory rulings which demonstrated a prejudicial bent of mind and anti-Whitely bias. Those rulings and the matters complained of are set forth at length in the ALJ's *Memorandum Opinion and Order*, FCC 89M-607, released February 22, 1989, denying Whitely's disqualification request. No useful purpose would be served by recounting them in detail here. Rather, for the purposes of this review, we need only mention that Whitely charged the ALJ with improperly disregarding a Whitely reply pleading in conjunction with an interlocutory ruling; arbitrarily refusing to clarify an ambiguous interlocutory ruling which was critical to Whitely's case; failing either to address or to consider adequately another pleading filed by Whitely – a motion to strike WWOR-TV, Inc.'s motion to enlarge issues against Whitely; allowing unauthorized waivers of the Commission's pleading requirements to the detriment of Whitely and the benefit of WWOR-TV, Inc.; issuing misleading rulings to the detriment of Whitely; failing to consider evidence supportive of Whitely's case; and unjustly criticizing Whitely for not attending a prehearing conference and for its *pro se* representation in this proceeding.

4. To establish a basis for an ALJ's disqualification, the moving party must show personal bias or prejudice that will impair the ALJ's ability to act in an impartial manner. *Barnes Enterprises, Inc.*, 66 FCC 2d 499, 501 ¶¶ 4-5 (1977), citing *Berger v. United States*, 255 U.S. 22, 33-35 (1921). Ordinarily, "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnel Corp.*, 384 U.S. 563, 583 (1966). Moreover, the substance of an ALJ's interlocutory rulings are not a basis for disqualification because they are subject to review. *Id.* The Commission, however, has recognized that, because "it is not always possible to establish an extra-judicial source of bias, . . . the comments and rulings of the trier of fact may be relevant to the existence of prejudice." *KAYE Broadcasting, Inc.*, 35 FCC 2d 548 ¶ 3 (1972).

5. Consistent with the holding in *KAYE*, we have reviewed the ALJ's actions here complained of to determine if they evidence bias. In doing so, we have also taken into consideration the ALJ's explanations for his actions as set forth in his *Memorandum Opinion and Order*, *supra*, denying Whitely's disqualification request, as well as Whitely's exceptions thereto. Without considering whether we agree with each of the ALJ's actions, we find that the ALJ has attempted to deal with matters raised in a fair and even handed manner, and that Whitely's perceptions to the contrary are simply not supported by the record as compiled in this proceeding. Thus, we agree with the ALJ that no showing has been made which would warrant grant of Whitely's request to disqualify.

6. As mentioned, the ALJ added a financial qualification issue and a related certification issue against Whitely in this proceeding. *Memorandum Opinion and Order*, FCC 88M-3567, released October 25, 1988. Whitely thereafter sought permission from the ALJ to appeal that issue enlargement order, and the ALJ disallowed the appeal.

Order, FCC 88M-3862, released November 15, 1988. Whitely then asked the Review Board to accept an appeal of the ALJ's issue enlargement order, and the Board denied the request. *Order*, 3 FCC Rcd 7211 (Rev. Bd. 1988), incorporating by reference the Board's holding in *Memorandum Opinion and Order*, 3 FCC Rcd 7175 (Rev. Bd. 1988), which denied a similar request to accept an appeal filed by Garden State Broadcasting Limited Partnership. Unsatisfied with those rulings, Whitely now asks us to entertain its appeal of the ALJ's action adding the hearing issues against it.

7. We will reject that request for essentially the same reasons set forth by the Board. Our rules governing appeals of interlocutory rulings are designed to ensure orderly procedure in adjudicatory proceedings and to avoid the disruption which would take place if proceedings were interrupted every time a party is dissatisfied with an ALJ's ruling on an interlocutory matter and seeks to have either the Review Board or the Commission pass upon that matter. 47 C.F.R. § 1.301. Accordingly, except for interlocutory appeals permitted as of right under section 1.301(a) and those allowed by the ALJ under section 1.301(b) --neither of which are here at issue -- it is the Commission's policy not to entertain interlocutory appeals except where it has been shown that there has been such a flagrant abuse of discretion by the ALJ as would require a reversal of the Initial Decision and a hearing *de novo;* or where the proceeding involves vital concerns relating to the public interest.

8. Applying the foregoing test to Whitely's earlier motion to accept its appeal, the Board concluded that Whitely had not made the requisite showing to justify acceptance of its appeal. Accordingly, consistent with the Commission's policy in this regard, the Board denied Whitely's motion, and, based on our review, we see no reason to modify that ruling. Whitely has made no showing that the ALJ's ruling would result in both reversal of the Initial Decision and a hearing *de novo* or that this case involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which can not otherwise adequately be protected.

9. In this respect, one additional matter warrants some clarification. Throughout its pleadings, Whitely contends that the ALJ has not engaged in reasoned decision making because he has either failed to set forth complete and reasoned explanations for his rulings or has ruled summarily without the benefit of any explanation. These fundamental deficiencies in the ALJ's rulings, Whitely argues, negate its due process rights to effectuate an appeal because there is either an inadequate or no record basis upon which it may rely in seeking to appeal the ALJ's rulings in question. As support for its alleged denial of due process in this regard, Whitely cites numerous court cases for the proposition that administrative agencies must satisfactorily articulate with clarity the reasons for their actions so that, among other things, adversely affected parties can adequately exercise their substantive rights to appeal.

10. To begin with, we are here dealing with interlocutory rulings by an ALJ, rather than final dispositive actions by an administrative agency. Thus, the teachings of the court cases relied on by Whitely are inapposite. In any event, if those interlocutory rulings are infirm as Whitely alleges, we fail to see how that would infringe on Whitely's substantive rights to effectuate an adequate appeal. 5 U.S.C. § 556(e) provides that the transcript of the testimony and exhibits, *together with all papers and requests filed in the proceeding*, constitutes the record of an adjudicatory proceeding and upon which the agency relies in rendering its decisions. *See also* 47 C.F.R. § 1.203. Consequently, should Whitely decide at a later juncture of this proceeding to appeal the ALJ's rulings complained of to the Review Board[1] or, indeed, further appeal those rulings to the Commission *en banc* via an application for review of the Board's decision, it may rely on the total record as compiled in this case which contains, among other matters, the pleadings, arguments and purported evidence which Whitely believes the ALJ erroneously considered or ignored. By the same token, any review by the Board or Commission would necessarily be based on a consideration of the total record and not limited solely to a review of the substance of the ALJ's interlocutory order in question.

11. ACCORDINGLY, IT IS ORDERED, That the Exceptions to Memorandum Opinion and Order filed March 6, 1989 by Whitely Communications ARE DENIED, and that the Memorandum Opinion and Order (FCC 89M-607, released February 22, 1989) of Administrative Law Judge Richard L. Sippel denying a Request for Withdrawal of Presiding Judge IS AFFIRMED.

12. IT IS FURTHER ORDERED, That the Motion for Acceptance of Appeal filed December 27, 1988 by Whitely Communications IS DENIED, and that the Appeal and Petition for Stay filed December 27, 1988 by Whitely Communications ARE DISMISSED.

13. IT IS FURTHER ORDERED, That the Motion to Dismiss Petition for Stay filed January 6, 1989 and the Motion for Expedited Review filed March 6, 1989 by WWOR-TV, Inc. ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Parties dissatisfied with such rulings have the opportunity to raise their objections at the time the ALJ's Initial Decision is reviewed. *See* 47 C.F.R. § 1.301(b)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 23, 1989

Released: June 9, 1989

Mr. Burton Levine
WROV Broadcasters, Inc.
P.O. Box 4005
Roanoke, Virginia 24015

Dear Mr. Levine:

The Commission has before it the above-captioned license renewal application for Station WROV, in Roanoke, Virginia (File No. BR-880601UJ). Review of the station's EEO program and performance pursuant to our policies and procedures, *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), (*Broadcast EEO*), reflects a failure to comply with the Commission's Equal Employment Opportunity Rule.

Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit and promote qualified minorities and women and the licensee's on-going assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool for each hiring opportunity. The Commission also looks for any evidence of discrimination by a licensee.

When the renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, the application is granted, if otherwise appropriate. When the application indicates evidence of discrimination or an inadequate record of EEO efforts, the Commission may impose a variety of sanctions and or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission may designate the renewal application for hearing where the facts so warrant. *See Broadcast EEO*, 2 FCC Rcd 3967 (1987).

Our review of your renewal application and responses to our letter of inquiry reveals no evidence of discrimination but does reveal an inadequate record of EEO efforts. Throughout the 1981-1988 license term, you had 65 full-time hiring opportunities for which you selected 37 (57.0%) women and 10 (15.4%) blacks. Most of the blacks were not employed long enough to be reported in the station's annual employment filings.[1] You reported that the station utilized minority and/or female recruitment sources for only seven of the 65 full-time positions filled during the license term. In the upper-level positions, recruitment sources were used for only two of the 42 positions filled. You indicated contacts with the NAB Clearing House, the Professional Women's Association, and the Total Action Against Poverty Program. The Professional Women's Association was contacted only for clerical positions because this source was used only when filling positions for Secretary, Receptionist and Research Assistants. Your information also showed that for the 11 job vacancies filled from June 1, 1987, to June 1, 1988, affirmative recruitment efforts toward minorities were limited to contacting a minority referral source for a clerical position which resulted in the hiring of a black female. In addition, you acknowledged that "there is no question that the record indicates serious flaws in the recruitment program when examining the females and Blacks hired for each position."

The record before us, including the responses to our inquiry, indicates that little effort was made to recruit women and blacks for full-time positions, particularly for positions in the upper-level job categories. Also, there is no indication that you analyzed or assessed the station's EEO efforts. The station's EEO performance and superficial remedial actions implemented through the license term under review indicate that you failed to maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities in accordance with our rule. Nonetheless, you seek to be excused from EEO obligations on the grounds of economic hardship.

The available labor force for the Roanoke MSA includes 43.9% women and 9.9% blacks. In the 1981-1988 license term, the annual reports show that no blacks were employed in upper-level positions and overall only two blacks were employed during the license term, one in 1984 and a different person in 1985. Women were underrepresented in upper-level positions for six of the seven years between 1981 and 1988. Our review of the station's EEO program covering the year preceding the filing of the renewal application disclosed that there were 11 hiring opportunities, seven for upper-level positions, for which the station received 65 female referrals and 14 minority referrals. Of the 11 hires, six (54.5%) were women and one (9.1%) was a minority who apparently was not employed long enough to be reported on the annual employment report, Form 395. In the self-evaluation portion of the EEO program, you state that WROV continues to have problems recruiting minorities, particularly in upper-level positions, because of their limited availability in the Roanoke labor force, the increased employment demands of new television stations, and "the competitive salary situation which negatively affects AM-only stations . . . ." The evidence shows that there were repeated failures to comply with the Commission's affirmative action provisions set forth in Section 73.2080(b)(3), (b)(5), (c)(2), and (c)(5) of the rules. We have determined, however, that the facts in this case present no evidence of intentional discrimination.

In view of the foregoing, and our review of pertinent case precedent in this area, we conclude that the renewal application for station WROV should be granted for a full term, subject to reporting conditions for three years and a Notice of Apparent Liability for Forfeiture in the amount of $5,000. First, unlike the record in *Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988), (*Beaumont*), the instant record does not warrant designation for an

evidentiary hearing. In *Beaumont*, designation was required, *inter alia*, because the information before the Commission raised substantial questions as to whether the nearly simultaneous departure of five full-time and six part-time Black employees from the station was the result of discrimination. *Id.* at 507-510. Specifically, the licensee's several responses to Commission inquiries on this subject were contradictory and disputed by a petitioner. *Id.* at 504-506. By contrast, there is no evidence to suggest a sudden, simultaneous departure of either minority or female employees in the instant case. Further, Station WROV's explanation for the departure of its full-time Black employees is unchallenged and appears reasonable and there is no evidence of intentional discrimination. Thus, the record in the instant case is far less egregious than the record in *Beaumont*.

WROV's record also appears to be less egregious than the records of the licensees in *Kansas City Youth for Christ, Inc.*, 3 FCC Rcd 6866 (1988) (*Kansas City)* and *Woolfson Broadcasting Corporation*, FCC 89-165 (adopted: May 23, 1989) (*WSBY/WQHQ)*. In *WSBY/WQHQ* upon finding that the licensee neither followed its EEO program nor hired any minorities, despite its 33 full-time hiring opportunities in an area where minorities constitute 20% of a labor force, we granted a short term renewal subject to reporting conditions and a $15,000 forfeiture. In *Kansas City*, we granted a short term renewal, reporting conditions and a $10,000 forfeiture upon finding that while the licensee did not have an EEO program, it hired minorities for two of 19 full-time vacancies in an area where minorities constituted 12% of the labor force. Unlike the licensee in *Kansas City* and *WSBY/WQHQ*, WROV had an EEO program which the licensee appears to have followed to some extent to hire minorities for ten of the 65 full-time positions and women for 37 of the 65 full-time positions in an area where minorities constitute 9.9% of the work force and women constitute 43.9% of the work force. Further, unlike the licensees in both *Kansas City* and *WSBY/WQHQ*, WROV made some attempts to recruit minorities and women. In this regard, while its efforts were not satisfactory, WROV did contact minority and female recruitment sources, such as the National Association of Broadcasting Clearinghouse, the Professional Women's Association and Total Action Against Poverty. In the year preceding the filing of the renewal application, WROV received 65 female referrals and 14 minority referrals to fill 11 positions, seven of which were upper-level positions. Thus, the record in the instant case warrants a lesser sanction than that imposed in *Beaumont, supra*, *WSBY/WQHQ, supra*, and *Kansas City, supra*.

However, it appears from WROV's record that a greater sanction is required in this case than in those cases in which we have granted renewals subject only to reporting conditions, *e.g., Application of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988) *(WXEL-TV and WNFT-TV); Applications of Certain Broadcast Stations Serving Communities in Michigan and Ohio*, 3 FCC Rcd 6944 (1988) *(WUAB); Application of Greater New Orleans Educational Television Foundation*, 3 FCC Rcd 1923 (1988) *(WYES-TV); Station WFBR*, 3 FCC Rcd 5913 (1988). In those cases, reporting conditions were ordered because we determined, *inter alia*, that the licensees' efforts in assuring that minorities and women were in the applicant pool for all positions were inadequate, despite evidence of more regular contacts with recruitment sources than those evidenced at WROV. WROV reported that it utilized minority and/or female recruitment sources for only seven out of 65 full-time positions filled during the 1981-1988 license term. In the upper-four job categories, affirmative recruitment sources were utilized for only two of the 42 positions filled. Unlike the stations cited above, at which minorities were employed throughout the license term, WROV's record during the 1981-1988 license term reveals no blacks in upper-level positions and a degree of underrepresentation of women in upper-level positions in four years of the license term.

In summary, hearing designation, as in *Beaumont, supra*, is not warranted in this case. However, reporting conditions and a lesser forfeiture than those imposed in WSBY/WQHQ, *supra, and Kansas City, supra*, is warranted.

Accordingly, IT IS ORDERED, that the application of the WROV Broadcasters, Inc. of Roanoke, Virginia for renewal of license IS GRANTED subject to the reporting conditions specified herein.[2]

IT IS FURTHER ORDERED, That, pursuant to Section 503 of the Communications Act of 1934, as amended, WROV Broadcasters, Inc. is hereby advised of its apparent liability for forfeiture of $5,000 for its repeated failures to comply with Section 73.2080 of the Commission's Rules in the manner described above.

IT IS FURTHER ORDERED, That the licensee of station WROV is directed to submit an original and one copy of the following information on June 1, 1990, June 1, 1991 and June 1, 1992:

(a) For the June 1, 1990 report, a list of all job vacancies during the twelve months preceding May 1, 1990, and for the June 1, 1991 and June 1, 1992 reports, a list covering the 12 months preceding May 1, 1991 and May 1, 1992, respectively, indicating the job title and full or part-time status of the position, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired;[3]

(b) a list of employees as of the May 1, 1990 payroll period for the first report and as of the May 1, 1991 and May 1, 1992 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid to the lowest paid), FCC Form 395-B classification, date of hire, sex and race or national origin; and

(c) details concerning the stations' efforts to recruit blacks for each position filled during the 12 month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

In addition, the licensee may submit any information it believes relevant with regard to the station's EEO performance and to its efforts thereunder. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may call the Mass Media Bureau's EEO Branch (202-632-7069). In regard to the forfeiture pro-

ceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter. Any comments relating to your ability to pay should include those financial items set forth in the noted attachment.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] A subsequent submission dated March 9, 1989 reports the Blacks hired for full-time and part-time positions from 1979 through the end of the license term, including the period after the renewal application was filed. Blacks were hired during the license term for six clerical openings and with one exception only remained with the station a short time.

[2] In this regard, we are mindful of an assignment of license of WROV Broadcasters, Inc. to Lisa Broadcasting, Inc. and we intend that the reporting conditions should apply to the assignee upon the consummation of the sale.

[3] Such a list might start: (1) D.J., part-time, white female, A.W.R.T.; white male, newspaper; black male, Urban League - selected white female.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 23, 1989

Released: June 9, 1989

Mark L. Woolfson, Sr.
President
Woolfson Broadcasting Corporation
of Salisbury/Ocean City, Inc.
P.O. Box 3388
Palm Beach, Florida 33480-1588

Dear Mr. Woolfson:

This refers to your applications for renewal of the licenses for stations WSBY/WQHQ-FM, Salisbury and Ocean City, Maryland respectively, and for the assignment of the licenses of those stations to HVS Partners. Review of the applications reveals that the stations' EEO records reflect repeated violations of the Commission's EEO rule. Accordingly, pursuant to Section 502 of the Communications Act of 1934, this letter also constitutes a Notice of Apparent Liability for a forfeiture.

Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit and promote qualified minorities and women and the licensee's on-going assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool for each hiring opportunity. The Commission also focuses on any evidence of discrimination by a licensee.

When the renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, the application is granted, if otherwise appropriate. When the application indicates evidence of discrimination or an inadequate record of EEO efforts, the Commission may impose a variety of sanctions, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission may designate the renewal application for hearing where the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987).

Our review of your renewal application and responses to two letters of inquiry reveals no evidence of discrimination but does reveal an inadequate record of EEO efforts. From February 1986 through September 1988, the end of the license term, and during the four months after you filed your renewal application, you had 33 full-time hiring opportunities, but no minorities were hired. You used minority recruitment sources for only 14 of the 33 vacancies. From these contacts, you received only two minority referrals -- one each for two of the 33 vacancies. Notwithstanding your previous lack of success in getting minority referrals from the University of Maryland - Eastern Shore, you used, with one exception, this single minority recruitment source for 13 of the 14 contacts. The single exception was the use -- two weeks before the close of the license term -- of one additional minority recruitment source, from which you received no referrals.

Moreover, it does not appear that you undertook a meaningful self-evaluation of your EEO program as required by the rules. In the EEO program you submitted at the time the stations were assigned to you, you identified sources deemed sufficient for female and minority recruitment. However, even though only two referrals were obtained, you did not modify the EEO program until the last six months of the license term. Mark R. Woolfson, Jr., Vice-President and General Manager of the stations since April 1987, admitted that he was unaware of the stations' EEO obligations or the contents of the stations' Model EEO program submitted as part of its assignment application. When made aware of the shortfalls in the stations' EEO programs by the operations manager in April 1988 and later by counsel at the time you filed for license renewal, Mr. Woolfson, Jr., explained that you began to expand your recruitment sources. He also asserted that the stations' pending sale made it difficult to maintain the present staff and discouraged potential applicants despite increased recruitment efforts. We find, however, that neither the past nor the pending status of a station's particular situation releases it from its obligation to have a continuing and effective EEO program.

The available labor force for Wicomico County, Maryland is 19.1% Black. Data for the EEO reporting year, *i.e.*, 12 month period prior to submission of your stations' renewal applications, revealed an absence of Blacks on the stations' full-time staff of 20. Prior employment reports reveal that the stations employed no Blacks on their staffs of 27 full-time employees in 1987. In 1986, the year you acquired the stations, the stations' full-time staff of 27 included two Blacks. You reported that one of the Black employees left the station voluntarily to attend college full-time and the other, who held a supervisory advertising accounts position, was terminated because reorganization of the sales department required the elimination of some sales positions.

The record before us suggests that, during the first two years you held the license of the stations, you neither recruited minorities nor analyzed the stations' efforts to recruit, hire, promote and retain minorities. As a consequence, the stations lost the two minority employees they had and hired no minorities in full-time positions. At best, it appears that the licensee had no particular EEO program until the end of the license term. Even then the EEO program remained inadequate.

The evidence has shown that there were repeated failures to comply with the Commission's affirmative action provisions set forth in Sections 73.2080(b)(3), (b)(5), (c)(2), and (c)(5) of the rules. In view of the foregoing, and our review of pertinent case precedent in this area, we conclude that the renewal applications for stations WSBY/WQHQ should be granted on a short term basis, subject to reporting conditions for three years and a $15,000 forfeiture. First, unlike *Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988), (*Beaumont*), the instant

record does not warrant designation for an evidentiary hearing. In *Beaumont*, designation was required, *inter alia*, because the information before the Commission raised substantial questions as to whether the departure of five full-time and six part-time Black employees from the station was the result of discrimination. *Id.* at 507-510. Specifically, the licensee's several responses to Commission inquiries on this subject were contradictory and disputed by a petitioner. *Id.* at 504-506. By way of contrast, WSBY/WQHQ's explanation for the departure of its two full-time Black employees is unchallenged and appears reasonable and there is no evidence of intentional discrimination. Thus, the instant case is less egregious than *Beaumont*.

However, WSBY/WQHQ's overall affirmative action performance under the current licensee does appear to raise more concerns than the record of the licensee in *Kansas City Youth for Christ, Inc.*, 3 FCC Rcd 6866 (1988), (*Kansas City*), which was granted a short term renewal, subject to reporting conditions and a $10,000 forfeiture. In this regard, while the Kansas City licensee did not have an EEO program and WSBY/WQHQ generally did not follow its EEO program,[1] the former actually hired minorities for two of 19 full-time vacancies in an area where minorities constituted 12% of the labor force. Conversely, WSBY/WQHQ, which is in an area where minorities constitute 19.1% of the labor force, had 33 full-time hiring opportunities but hired no minorities,[2] and its existing minorities left the stations.

In summary, while hearing designation as in *Beaumont*, *supra*, is unwarranted in this case, reporting conditions, a short term renewal and a greater forfeiture than that imposed in *Kansas City*, *supra*, are warranted.

In evaluating an application for license renewal within the EEO context, the Commission first must decide whether renewal is in the public interest and, if so, under what period of time and under what conditions. In this regard, short-term renewal and reporting conditions are not so much penalties as prospective remedies to enforce the Commission's affirmative action policy. *See Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 507 (D.C. Cir. 1988); *Bilingual - Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 628, (D.C. Cir. 1978). Thus, in contrast with the Equal Employment Opportunity Commission (EEOC), which primarily seeks to remedy the effects of past discrimination, the Commission is mainly concerned with the future and its ability to monitor broadcasters' progress and improve their efforts in recruiting and hiring minorities. *Bilingual*, 595 F.2d at 628. The stations before us have very serious EEO shortcomings requiring immediate and substantial changes in the stations' hiring and promotion practices. Accordingly, the most efficient manner to ensure that such changes are forthcoming is to impose reporting conditions and a short-term renewal.[3]

Once we have determined that only short-term renewal with conditions is appropriate, the remaining issue is whether we should refrain from imposing these prospective remedies when, as in this case, an assignment application is pending.[4] Because the short-term and reporting conditions serve a largely remedial function -- ensuring that the facility is operated in compliance with our EEO rules -- we see no public interest reason not to impose those measures in a case where they are otherwise appropriate, simply because the license is being assigned. Such an approach would permit a station with defective EEO performance to be passed to different owners over a period of time without having to comply with our EEO rules. That approach would not serve the public interest.

Similarly, it would not be appropriate to refrain from imposing prospective remedies merely because there is no evidence that the assignee will not comply with our EEO rules. If it chose to focus on the proposed buyer, the Commission would need to enter the morass of having to examine each buyer's worthiness for arguably different treatment. Such an exercise would be difficult and time-consuming and, above all, would not be an effective means of ensuring future EEO compliance at stations where the assignor did not maintain an adequate EEO program. We do not believe that any unfair burdens are imposed on entities that knowingly purchase such stations by requiring them to be subject to the same limitations and conditions as the existing licensee would be if it chose to keep its station.[5] Therefore, once we have determined that particular EEO remedies are appropriate, they are to be implemented by whomever is operating the station, whether that licensee was the one responsible for the violations or is simply the successor-in-interest to the former licensee.

Accordingly, IT IS ORDERED, that the application of the Woolfson Broadcasting Corporation of Salisbury/Ocean City, Inc. for renewal of license of Stations WSBY/WQHQ-FM IS GRANTED FOR A SHORT TERM ending October 1, 1992, subject to the reporting conditions specified herein.

IT IS FURTHER ORDERED, That, pursuant to Section 503 of the Communications Act of 1934, as amended, Woolfson is hereby advised of its apparent liability for forfeiture of $15,000 for its repeated failures to comply with Section 73.2080 of the Commission's Rules in the manner described above.

IT IS FURTHER ORDERED, That, the applications to assign the licenses of stations WSBY and WQHQ-FM, as renewed for a short term ending October 1, 1992, subject to the reporting conditions specified herein, from Woolfson Broadcasting Corporation of Salisbury/Ocean City, Inc. to HVS Partners ARE GRANTED.

IT IS FURTHER ORDERED, That the licensee of stations WSBY and WQHQ-FM, is directed to submit an original and one copy of the following information on June 1, 1990, June 1, 1991 and June 1, 1992:

(a) For the June 1, 1990 report, a list of all job vacancies during the twelve months preceding May 1, 1990, and for the June 1, 1991 and June 1, 1992 reports, a list covering the 12 months preceding May 1, 1991 and May 1, 1992, respectively, indicating the job title and full or part-time status of the position, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired[6];

(b) a list of employees as of the May 1, 1990 payroll period for the first report and as of the May 1, 1991 and May 1, 1992 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid to the lowest paid), FCC Form 395-B classification, date of hire, sex and race or national origin; and

(c) details concerning the stations' efforts to recruit blacks for each position filled during the 12 month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

In addition, the licensee may submit any information it believes relevant with regard to the station's EEO performance and to its efforts thereunder. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may call the Mass Media Bureau's EEO Branch (202-632-7069). In regard to the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter. Any comments relating to your ability to pay should include those financial items set forth in the noted attachment.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* paragraphs 11 and 19 of WSBY/WQHQ's December 14, 1988 response to the Commission's December 6, 1988 inquiry.

[2] In other respects, the record in the instant case raises concerns similar to those raised in *Kansas City*, *Id.* In particular, like *Kansas City* (*id.* at 6867-6868), the record of the licensee here suggests that it was not engaging in direct, affirmative efforts to recruit women (*see* note 1, above) whenever job vacancies occurred.

[3] The aspect of our decision issuing a Notice of Apparent Liability is, of course, more punitive than prospective.

[4] If the remedies are not altered, they pass with the license to the assignee as a matter of law.

[5] Further, if we were to modify our decision as to the appropriate renewal term and conditions simply because of a pending assignment application, the renewal grant would have to be conditioned on consummation of the assignment. If the assignment were not consummated, we would then have to revisit our order granting the renewal and presumably impose stronger remedies. That approach, especially if the licensee came forward with alternative assignees, would not further prompt remedial action to the situation created by the incumbent licensee who presumably would continue to operate the station for some period of time. It would also lead to unnecessary procedural and administrative complexities.

[6] Such a list might start: (1) D.J., part-time, white female, A.W.R.T.; white male, newspaper; black male, Urban League - selected white female.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 6, 1989 **C7-516**

Released: July 27, 1989

Radio Carolina Limited Partnership
1400 Mercantile Lane
Suite 214
Landover, Maryland 20785

MEG Associates, LTD.
122 Asbury Avenue
Darlington, South Carolina 29532

In re: Stations WDAR and WMWG (FM)
Darlington, South Carolina

Gentlemen:

This refers to the pending applications for renewal of licenses of Stations WDAR and WMWG(FM), Darlington, South Carolina (File Nos. BR-880801UY and BRH-880801YU) and the recent assignment of licenses (BAL-881116HZ and BAPLH-881116GE) from MEG Associates, Ltd. (MEG) to Radio Carolina Limited Partnership.[1] A review of the renewal applications reveals repeated violations of the Commission's EEO rule. Accordingly, pursuant to Section 503 of the Communications Act of 1934, as amended, this letter also constitutes a Notice of Apparent Liability for a forfeiture.

Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit and promote qualified minorities and women and the licensee's on-going assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool for each hiring opportunity.

When the renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, it is granted, if otherwise appropriate. When the application indicates evidence of discrimination or an inadequate record of EEO efforts, the Commission may impose a variety of sanctions and remedies, such as reporting conditions, renewal for less than a full term, forfeiture or a combination thereof. Further, the Commission may designate the renewal application for hearing where the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO*).

Our review of the renewal applications and reply to our letter of inquiry reveals no evidence of discrimination but does reveal an inadequate record of EEO efforts over the four year period MEG associates, Ltd. (MEG) held the licenses.[2] The licensee was unable to produce any records of its EEO efforts concerning the recruitment, hiring, promotion or retention of minorities during the period June 1984 to June 1987. In response to our request for minority hiring data for this period, MEG responded that the stations could not supply the information because "they had very little records to go by." Subsequently the Commission was advised that the records were incomplete, unavailable or unreliable due to changes in managerial staff. WDAR/WMWG(FM)'s employment profiles (Form 395-B) for those years reflect only one minority on the stations' full-time staff, a black male classified as a professional, who was reported on the 1987 Form 395-B. As a consequence, we are constrained to conclude that the licensee failed to establish and maintain an EEO program reflecting positive and continuing efforts to recruit, hire and promote minorities.

Moreover, it does not appear that MEG undertook a meaningful self-evaluation of its EEO program when it became apparent that its efforts were not successful in obtaining minority referrals, applicants or hires. This is particularly evident since the stations are located in a labor market that has a 35.2% available minority labor force but failed to hire a full-time minority employee in spite of 10 hiring opportunities over the renewal reporting period.[3] Further, although MEG listed three sources deemed appropriate for female and minority recruitment, it failed to contact these sources for minority referrals during the reporting period.[4] Instead, one position was advertised in the newspaper; one position was advertised over the stations' facilities; and, the remaining eight positions were filled by direct hires with no other applicants solicited.

The available minority labor force for Darlington County, South Carolina is 35.2% (34.4% Black, .6% Hispanic, .2% Other). The 1988 annual employment report (Form 395-B) used to evaluate the renewal EEO program revealed only one minority (6.7%) on a full-time staff of 15 employees. A comparison of the 1988 and 1987 reports reflects an increase of four full-time employees but no increase in minorities. The reports for 1984 - 1986 reflect that no minorities were employed on the full-time staff.

Based on the foregoing, we conclude that throughout the four year period MEG Associates, Ltd. held the licenses of WDAR/WMWG(FM) there were inadequate efforts to recruit, hire, promote and retain minorities and a failure to analyze, evaluate or modify the EEO program. Thus there were repeated failures to comply with the Commission's EEO affirmative action provisions set in Sections 73.2080 (b)(3) and (b)(5) and Sections 73.2080 (c)(2) and (C)(5) of the Rules.

In view of the foregoing, we must now determine the appropriate sanctions and remedies to be imposed. *See Broadcast EEO*, *supra*. First, the instant record does not indicate intentional discrimination nor raise substantial or material factual questions which would warrant designation for an evidentiary hearing. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988), (*Beaumont*). In *Beaumont*, designation was required *inter alia*, because the information before the Commission raised substantial questions as to whether the departure of five full-time and

six part-time Black employees was the result of discrimination. *Id.* at 507-510. Specifically, the licensee's several responses to Commission inquiries on this subject were contradictory and disputed by petitioner. *Id.* at 504-506. Here the record raises no substantial or material factual questions of discrimination.[5] Thus, the record in the instant case is less egregious than the record in *Beaumont*.

The record evidences a lack of an EEO program for minorities over the period held by licensee, and a failure to engage in an on-going self-assessment of its EEO efforts. Our review of pertinent case precedent in this area indicates it raises similar concerns as the records of the licensees in *Kansas City Youth for Christ, Inc.*, 3 FCC Rcd 6866 (1988), (*Kansas City)* and *Woolfson Broadcasting Corp.*, FCC 89-165 (adopted: May 23, 1989; released: June 9, 1989) (*Salisbury)*.

In *Kansas City*, we granted a two-year short-term renewal subject to reporting conditions and levied a $10,000 forfeiture upon finding that the licensees did not have an EEO program for minorities or women over the license term and did not engage in an on going self-assessment of its EEO efforts. The record indicated that the licensee was located in a labor market which had a 14% available minority labor force and employed 2 minorities on a full-time staff of 20 employees. However, the evidence revealed that although the licensee had 19 hiring opportunities over the five year license term, the two minority hires occurred in the last six months of the license term, while over the preceding three years (1987-1985) there was an absence of Blacks on the stations' full-time work force. The record further showed that over this period the licensee engaged in no efforts to recruit minorities or women, and its self-analysis of its efforts proposed no modification in its EEO program.

In *Salisbury*, although we imposed the same prospective sanctions of a short-term renewal with reporting conditions as in *Kansas City*, we levied a heavier forfeiture ($15,000) in view of the particularly egregious record. The licensee was located in a labor market which had a 19.1% minority labor force availability and the record showed it employed no minorities on a full-time staff of 20 employees, hired no minorities in spite of 33 hiring opportunities, and made minimal minority recruitment efforts over the two years the licensee held the licenses. The record fails to establish that MEG made any significant effort to recruit minorities. MEG did not track its minority hires or promotions during the first three years it operated the stations and failed to contact any minority recruitment sources during the last year. In addition, WDAR/WMWG(FM)'s record shows that the licensee employed only one minority (6.7%) on a full-time staff of 15 employees. The stations are located in a labor market with a 35.2% minority workforce. MEG hired no full-time minority employees over the last 12 months of the license term despite ten full-time hiring opportunities. During that period, however, MEG did promote one minority employee from its part-time to its full-time staff.

Like the licensees in *Salisbury* and *Kansas City*, MEG made little or no effort to maintain an EEO program, to contact minority recruitment sources, or to evaluate its EEO efforts. Nevertheless, MEG's record appears to be slightly better than the licensee's record in *Salisbury* because MEG did have some minority participation on the stations' staff, reporting one full-time Black employee in 1987 and one in 1988. During the 1987-1988 reporting period, MEG promoted one part-time Black female announcer into a full-time position. Therefore, we believe that a forfeiture in this case should be less than the $15,000 assessed in *Salisbury*.

On the other hand, MEG's record is slightly worse than the licensee's record in *Kansas City*, where we assessed a fine of $10,000. In that case, the licensee lacked an EEO program but nevertheless reported two minority employees (10%) on a full-time staff of 20, in a market where the labor force included 14% minority representation. MEG, on the other hand, reported no minority employees in 1985 and 1986 in a market with 35.2% minority representation in the labor force. MEG reported one minority employee (9.1%) on a full-time staff of 11 in 1987 and one minority employee (6.7%) on a full-time staff of 15 in 1988. Therefore, we are setting the fine in this case at $12,000.

Since we are considering a similar lack of EEO efforts in all three cases, we believe the instant record also requires the same prospective sanctions of a short-term renewal with periodic reporting conditions as in *Kansas City* and *Salisbury*. Reporting conditions are necessary to ensure that immediate and substantial changes are forthcoming in the stations' recruiting, hiring, and promotion practices. A shortened license term will enable us to evaluate the licensees' overall EEO performance and to monitor the progress in achieving EEO compliance.

Accordingly, while we find that grant of the renewal applications for Stations WDAR and WMWG(FM), Darlington, South Carolina, will serve the public interest, we also find it appropriate to grant the license renewals for less than a full-term with reporting conditions and to impose a forfeiture of $12,000 for past rule violations. The evidence has shown that the repeated violations of the EEO rules occurred during the period MEG Associates, Ltd. ("MEG") held the licenses of Stations WDAR and WMWG(FM). *See* fn. 1, *supra*. We intend, therefore, that MEG be liable for the forfeiture in the amount of $12,000 for the past rule violations.

We take notice here that MEG assigned its license authorizations to Radio Carolina Limited Partnership on February 7, 1989 and that such assignment was conditional on any action in this proceeding. Therefore, the EEO remedies we are imposing herein *(i.e.* short-term renewal and reporting conditions) pass to assignee as a matter of law.

Accordingly, IT IS ORDERED that the applications of Radio Carolina Limited Partnership for renewal of license of Station WDAR and WMWG(FM) ARE GRANTED FOR A SHORT-TERM ending December 1, 1991 subject to the reporting conditions specified herein.

IT IS FURTHER ORDERED, That, pursuant to Section 503 of the Communications Act of 1934, as amended, MEG Associates, Ltd., is hereby advised of its apparent liability for forfeiture of $12,000 for its reported failure to comply with Section 73.2080 of the Commission's Rules in the manner described above.

IT IS FURTHER ORDERED, That the licensee of WDAR and WMWG (FM) is directed to submit an original and one copy of the following information on August 1, 1990 and with its next renewal application:

(a) For the August 1, 1990 report, a list of all job vacancies during the twelve months preceding July 1, 1990, and for the twelve months preceding July 1, 1991 for the renewal application report, a list

indicating job title and full or part-time status of the position, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired[6];

(b) a list of employees as of the July 1, 1990 payroll period for the first report and as of July 1, 1991 payroll period for the renewal report, by job title, indicating part-time or full-time status (ranked from the highest to the lowest paid), FCC Form 395-B classification, date of hire, sex and race or national origin; and

(c) details concerning the stations' efforts to recruit Blacks for each position filled during the periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

In addition, to the supplemental information requested above, the licensee may submit any information it believes relevant with regard to the stations' EEO performance and to its efforts thereunder. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may call the Mass Media Bureau's EEO Branch (202-632-7069). In regard to the forfeiture proceeding, you may take any action set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter. Any comments relating to your ability to pay should include those financial items set forth in the noted attachment.

BY DIRECTION OF THE COMMISSION*

Donna R. Searcy
Secretary

*Commissioner Quello concurring in result.

FOOTNOTES

[1] On February 7, 1989, the Mass Media Bureau, pursuant to delegated authority, inadvertently granted without conditions, applications assigning the licenses of WDAR and WMWG(FM) from MEG Associates, Ltd. to Radio Carolina Limited Partnership. The sale was consumated on February 10, 1989. Also pending before the Commission on February 7, 1989 were the renewal applications for the same stations. Subsequently, the Commission on its own motion, within the requisite time period set forth in 47 C.F.R. Section 1.117 (a), reviewed the action and granted the assignments conditioned upon and subject to the disposition of the pending renewal applications. *See MEG Associates, Ltd.*, 4 FCC Rcd 2645 (1989). Accordingly, any remedies we impose herein pass with the licenses to the assignee. *See Woolfson Broadcasting Corp*, FCC 89-165 (adopted: May 23, 1989; released: June 9, 1989) (*Salisbury*).

[2] Stations WDAR/WMWG(FM) were assigned to MEG Associates, Ltd. on June 15, 1984 and consumated on June 28, 1984 (BAL-840405HW and BALH-840405).

[3] The renewal reporting period, July 1, 1987 to June 30, 1988, comprised the last 12 months of the license term under review. Although the licensee reported one minority hire in February 1988 out of 11 full-time hiring opportunities, the response to our inquiry indicates that a Black female announcer was hired in November 1987, and worked for the stations part-time until she was able to work full-time in February 1988. The conversion of a part-time employee to full-time status is normally regarded as a promotion rather than a full-time hire. Nevertheless, the net result is the same; the stations added one full-time Black female employee.

[4] The minority recruitment sources listed were a job placement service at Francis Marion College in Florence, South Carolina and two local Black formatted radio stations.

[5] The stations were initially sold in June 1984. *See* fn. 2. The annual employment reports since 1984 reflect the employment of minorities part-time through the end of the license term, adding one full-time minority employee, a black male, in 1987 and one full-time minority employee, a black female, in 1988.

[6] Such a list might start: (1) D.J., part-time, white female, A.W.R.T.; white male, newspaper; black male, Urban League-selected white female.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-410

In the Matter of

Amendment of Section 73.202(b),	RM-5802
Table of Allotments,	RM-6206
FM Broadcast Stations.	RM-6207
(Waterbury and Royalton, Vermont)	

ERRATUM

Released: July 26, 1989

By the Chief, Allocations Branch:

On June 20, 1989, the Commission released a *Report and Order* in the above captioned proceeding. *See* 54 FR 27021, June 27, 1989. In the *Order* at paragraph 15 the entry for Plattsburgh, New York, incorrectly specified Class C2 for Channel 260. The entry is corrected to read:

Plattsburgh, New York	260C1

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-535

In the Matter of

Midyear 1986 Access Tariff Filings

Petitions for Waiver

MEMORANDUM OPINION AND ORDER

Adopted: July 25, 1989; Released: July 28, 1989

By the Deputy Chief, Common Carrier Bureau:

1. Central Telephone Companies (Centel) and Pacific Bell (PacBell) filed petitions for waiver[1] of that portion of the Commission's *December 19 Order* [2] directing local exchange carriers (LECs) to provide originating WATS access lines (WALs) with Feature Group A (FGA) and Feature Group B (FGB) services. On July 29, 1988, the petitioners were granted waivers of this requirement. The waivers are scheduled to expire on August 1, 1989.[3] The pending waiver requests are similar to the carriers' previous requests, and are unopposed.

2. In its petition, Centel states that it is currently providing unrestricted WATS access in its equal access offices. Centel also states that the demand for FGA and FGB WATS access is insubstantial and declining. It asserts the majority of the remaining access lines served by non-converted offices are smaller exchanges and that the likelihood of a carrier ordering WATS access through FGA and FGB is considered small. Centel maintains that its current tariff provision has been in effect for almost two years and no carrier has expressed dissatisfaction with the offering.

3. PacBell argues that it is unable to calculate accurately the credits for the Carrier Common Line Charge which would be due to interexchange carriers with regard to WALs ordered in conjunction with either originating FGA or FGB service. PacBell insists that it is not economically feasible to convert and reprogram its recording and billing systems in order to capture the call detail which would be required to provide originating FGA and FGB services in conjunction with WALs. It proposes to continue to provide at no charge a WATS access line extension from a PacBell end office which has not been converted to equal access to a distant converted WATS serving office.

4. The waiver requests are similar to those filed by Centel and PacBell in 1987 and in 1988. We conclude that the public interest would be served by a one-year extension of the existing waivers.

5. Accordingly, IT IS ORDERED that the petitions for waiver filed by Central Telephone Companies and Pacific Bell ARE GRANTED to the extent indicated herein.

6. IT IS FURTHER ORDERED that the waiver granted by this Order expires on August 1, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

FOOTNOTES

[1] Central Telephone Companies Petition for Waiver, filed June 6, 1989, and Pacific Bell Petition for Extension of Waiver, filed July 12, 1989.

[2] Midyear 1986 Access Tariff Filings, 1 FCC Rcd 1247 (1986) (*December 19 Order*).

[3] *See* Midyear 1986 Access Tariff Filings, Memorandum Opinion and Order, 3 FCC Rcd 4838 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-333

In the Matter of

Amendment of Section 73.202(b),	RM-6678
Table of Allotments,	
FM Broadcast Stations.	
(Camarillo, California)	

NOTICE OF PROPOSED RULE MAKING

Adopted: July 19, 1989; Released: August 8, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Golden Bear Broadcasting, Inc. (petitioner), licensee of Station KZTR-FM, Channel 240A, Camarillo, California, seeking the substitution of Channel 240B1 for Channel 240A and modification of its license accordingly, to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 240B1 can be allotted to Camarillo at the petitioner's suggested site 17.8 kilometers (11.1 miles) west[1] of the community, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. However, since Camarillo is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain concurrence of that Government in the proposal.

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 240B1 for Channel 240A at Camarillo, California. As requested, we also propose to modify the Class A license of Station KZTR-FM to specify operation on Channel 240B1. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 240B1 at Camarillo.

4. Accordingly, in order to provide Camarillo with its first expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Camarillo, California	240A	240B1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 29, 1989,** and reply comments on or before **October 16, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Roger J. Metzler, Esq.
McQuaid, Bedford, Brayton,
Clausen & Metzler
650 California Street
Suite 800
San Francisco, CA 94108

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Reference coordinates at the petitioner's suggested site for Channel 240B1 at Camarillo are 34-13-21 and 119-13-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-619

In the Matter of

Amendment of Section 73.202(b),	RM-5907
Table of Allotments,	RM-6132
FM Broadcast Stations.	RM-6322
(Gosnell and Osceola, Arkansas;	
Germantown and Ripley, Tennessee[1])	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 19, 1989; Released: August 8, 1989

By the Chief, Allocations Branch:

1. The Commission has before it a *Notice of Proposed Rule Making*, 3 FCC Rcd 376 (1988), proposing the allotment of Channel 235A to either Gosnell, Arkansas, or Osceola, Arkansas, as a first or second local FM service, respectively. Earl M. Hodges ("Hodges"), d/b/a Mid-South Frequency Monitoring Service, the proponent of the Gosnell allotment, and Clarence Medlin ("Medlin"), the proponent of the Osceola allotment, separately filed comments expressing an intention to apply for the channel if allotted to their respective communities. Ardman Broadcasting Corporation of Tennessee ("Ardman"), licensee of Station WEZI(FM), Channel 232A, Germantown, Tennessee, filed an opposition to the proposals and a counterproposal suggesting the substitution of Channel 231C2 for Channel 232A at Germantown and the modification of Station WEZI's license to specify operation on the new channel accordingly, the substitution of Channel 235A for Channel 231A at Ripley, Tennessee, to accommodate the Germantown substitution, and the allotment of Channel 230A to Gosnell and Channel 297A to Osceola.[2] Medlin submitted reply comments to Ardman's counterproposal and to Hodges' comments. Hodges submitted reply comments to Ardman's counterproposal. Ardman also submitted an untimely amendment to its counterproposal proposing to allot Channel 279A to Wilson, Arkansas, in lieu of an allotment to Osceola,[3] and a timely statement in support of its counterproposal and reply comments. Pollack Broadcasting Company ("Pollack") submitted late-filed comments stating its intention to apply for an Osceola channel if allotted.[4] Hodges and Medlin jointly submitted letters expressing support for Ardman's counterproposal and withdrawing their previous expressions of intent to apply for Channel 235A if allotted to their respective communities. Hodges expressed his intention to apply for Channel 230A at Gosnell, and Medlin to apply for Channel 279A at Wilson, if allotted.[5]

2. Because Hodges and Medlin have withdrawn their support for the allotment of Channel 235A to Gosnell or Osceola, respectively, and no other timely expressions of interest have been received, we dismiss the proposals.[6] Both the Germantown substitution and an allotment to Gosnell can be accommodated. We believe that the public interest would be served by the allotment of Channel 230A to Gosnell as that community's first local FM service,[7] and by the substitution of Channel 231C2 for Channel 232A at Germantown as that community's first wide area FM service.[8] We simultaneously modify the license of Station WEZI(FM) to specify operation on the new channel. In addition, we substitute Channel 235A for 231A at Ripley to accommodate the Germantown substitution.[9]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 22, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

City	Channel Number
Gosnell, Arkansas	230A
Germantown, Tennessee	231C2, 298A
Ripley, Tennessee	235A

4. The window period for filing applications for Channel 230A at Gosnell will open on **September 25, 1989,** and close on **October 25, 1989.**

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Ardman Broadcasting Corporation of Tennessee for Station WEZI, Germantown, Tennessee, IS MODIFIED to specify operation on Channel 231C2, in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301). specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the proposal of Earl N. Hodges, d/b/a Mid-South Frequency Monitoring Service, (RM-5907) IS DISMISSED.

7. IT IS FURTHER ORDERED, That the proposal of Clarence Medlin (RM-6132) IS DISMISSED.

8. IT IS FURTHER ORDERED, That Pollack Broadcasting Company's "Petition for Leave to File Comments One Day Late" IS DENIED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Germantown and Ripley, Tennessee, have been added to the caption.

[2] Public Notice 1720, April 1, 1988. Ardman's counterproposal also requested a site restriction for the proposed allotment of Channel 229A at Senatobia, Mississippi. The Senatobia proposal has been separately dismissed. *See Report and Order*, 3 FCC Rcd 4000 (1988).

[3] The amendment, filed during the reply comment period, constitutes a new counterproposal because Ardman has proposed the introduction of another community to this proceeding. Section 1.420(d) of the Commission's Rules states that counterproposals advanced in reply comments will not be considered. Accordingly, we will not accept Ardman's amendment to its counterproposal.

[4] Pollack submits a petition for leave to file comments one day late, claiming the delay was due to a problem with the courier used to deliver the comments to the Commission. We deny Pollack's petition. It is the responsibility of the party submitting comments to ensure that the documents are delivered to the Commission on time. Furthermore, we will not consider an untimely expression of interest in the face of a conflicting proposal. *See Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988). Moreover, even if we were to accept Pollack's late-filed expression of interest, the Osceola proposal for a second local FM service is mutually exclusive with a counterproposal that would result in a first local FM service to Gosnell and a first wide area FM service to Germantown. Because first local service is of a higher priority than second local service, the Gosnell and Germantown allotments would generally be preferred over the Osceola allotment.

[5] Ardman also filed as supplemental comments an engineering statement showing the population and area contained within the proposed gain area of WEZI(FM). Ardman, referencing *Report and Order (Stamps and Camden, Arkansas)*, 3 FCC Rcd 3644 (1988), claims that the Commission requires a party in a rule making proceeding filing a counterproposal in which an upgrade of an existing license is proposed to submit a gain area showing. In this instance, Ardman was not required to submit a gain area showing because Ardman's counterproposal need not be comparatively considered. Furthermore, the supplemental comments were filed well after the deadline for filing comments in this proceeding. Therefore, we will not consider Ardman's supplemental comments. As a result, Pollack's response to supplemental comments, Ardman's and Hodges' motions to strike and alternatively reply to response to supplemental comments, Pollack's oppositions to motions to strike, and Ardman's reply to opposition to motion to strike are moot.

[6] Medlin subsequently filed a petition for rule making separately proposing the allotment of Channel 279A at Wilson. *See Notice of Proposed Rule Making*, 3 FCC Rcd 5753 (1988)

[7] Site coordinates for Channel 230A at Gosnell are 35-58-12, 89-57-40.

[8] Site coordinates for Channel 231C2 at Germantown are 35-02-12, 89-47-10.

[9] Site coordinates for Ripley are 35-47-58, 89-29-28. This substitution will not require modification of the transmitter sites proposed by the applicants for Channel 231A at Ripley (BPH-871007MA, BPH-871008MJ, BPH-871008MH).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

JERRELL KAUTZ File No. BPCT-870325KF

For Construction Permit
McCook, Nebraska

and

CARL M. FISHER File No. BPCT-870331K5

For Construction Permit
Lamar, Colorado

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 1989; Released: August 8, 1989

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned applications of Jerrell Kautz for a new commercial television station to operate on Channel 12, McCook, Nebraska, and Carl M. Fisher for a new commercial television station to operate on Channel 12, Lamar, Colorado; objections to each proposal filed by the Association of Maximum Service Telecasters (MST); and an informal objection to the Kautz proposal filed by the Nebraska Educational Telecommunications Commission (NETC), licensee of noncommercial educational Station KRNE-TV, Channel 12, Merriman, Nebraska.

2. Section 73.610(b)(1) of the Commission's Rules requires a minimum separation of 304.9 km between co-channel VHF stations operating in Zone II. The sites proposed by the applicants in this proceeding are 284.8 km apart, making the sites 20.1 km short-spaced to each other. Kautz's application was filed March 25, 1987, and was cut off ("A" cut-off) as to conflicting applications on June 2, 1987 (Report No. A-128, mimeo No. 3023, released April 30, 1987). Since Fisher's application was filed March 31, 1987, it was timely filed with respect to the Kautz application. Additionally, Kautz's site is 286.5 km from noncommercial educational Station KRNE-TV, Channel 12, Merriman, Nebraska, whereas Section 73.610 requires a minimum separation of 304.9 km. Therefore, Kautz's proposal is 18.4 km short-spaced to KRNE-TV. Kautz's site is also 24.2 km short-spaced to the Lamar, Colorado, reference point. Consequently, Kautz requests a waiver of Section 73.610.

3. Section 73.3572(e) of the Rules provides that, where television applications are mutually exclusive because the proposed transmitter sites are short-spaced to each other and where the second-filed application has been accepted for filing before the first-filed is reached for processing, both applications will be consolidated and designated for hearing. That rule, however, is applicable only to the situation where two pending applications meet all spacing requirements as to existing authorizations and reference points, but are short-spaced to each other. In other words, Kautz is entitled to comparative consideration with Fisher under Section 73.3572(e) only if he is in compliance with all other Commission spacing requirements. *Carolina Broadcasting Co.*, 18 F.C.C. 2d 482 (1969). Since Kautz's proposed site is also short-spaced to KRNE-TV, and to the reference point for Lamar, Colorado, it does not meet this test. Accordingly, Kautz must first show that waiver of Section 73.610 is warranted with respect to the short-spacing to KRNE-TV and to the Lamar, Colorado, reference point before his application can be designated for hearing with Fisher's proposal, and we turn now to a consideration of his waiver request.

4. In support of his waiver request, Kautz asserts that the allotment of channel 12 at McCook is usable only in an extremely small "window" area created by 190-mile (304.9 km) circles from the sites of co-channel stations KRNE-TV, Merriman, Nebraska, and KWCH-TV, Hutchinson, Kansas, and the channel 12 reference point at Lamar. In order to comply with our minimum separation requirements (Section 73.610 of the Rules), Kautz would have to locate his tower within this small area, but any site within the "window" area would be 29-33 miles from McCook. In order to encompass McCook within its predicted City Grade contour, a station located within the "window" area would need to operate with visual ERP of 316 kW and antenna height above ground level (AGL) of 750 feet (229 m). But, Kautz says, the terrain is such that line-of sight into McCook would be obstructed. Moreover, Kautz avers, the Federal Aviation Administration (FAA) has indicated that, because of an airport 4-6 miles north of the "window" area, it would not approve a tower in the "window" area over 500 feet (152 m) AGL. Also, according, to Kautz, the "window" area is in a flyway for migratory birds. Finally, Kautz contends that he tried to find a site within the "window" area, but the landowners are not interested in selling or leasing land because the area is known to contain oil deposits and oil exploration is in progress. Kautz further points out that he proposes to operate with modest facilities of 30 kW ERP and antenna height above average terrain of 313 feet (95 m).[1] The foregoing persuades us that no feasible fully-spaced sites are available for a channel 12 station in McCook.

5. Although Kautz has presented evidence that no site within the "window" area is available or feasible, he has not addressed the question of whether there is any less short-spaced site available outside of the "window" area. Kautz proposes to top-mount his TV antenna on the tower of Station KZMC-FM, McCook, Nebraska, in which he has a 40% interest. Because the short-spacings created by Kautz's proposal are so substantial, Kautz's failure to show that there are no less short-spaced sites available is critical. McCook lies between Kautz's proposed site to the west and the "window" area to the east. There appears to be a large area to the south in which a tower might be located short-spaced only to the Lamar reference point. Kautz has made no showing that no site within that area is available or feasible. Moreover, even if no site were available in this area, an effort should have been made to ascertain whether there might be sites available which, though short-spaced to the Merriman and/or Hutchinson stations,[2] would be minimally so. Kautz's Exhibit 2 to his application indicates that there are several other towers located closer to McCook than his proposed tower. These towers, or sites near them, would be less short-spaced to

Station KRNE-TV or to Lamar, or to both. There is no discussion in the waiver request that would lead us to conclude that these sites are unsuitable or unavailable. Furthermore, Kautz does not contend that the short-spacing to KRNE-TV is inconsequential; he merely characterizes it as unavoidable. This, however, has not been established and it leaves the present short-spacing without justification. Kautz's waiver request must, therefore, be denied and his application dismissed. Because of questions which exist with respect to Fisher's basic qualifications and his financial qualifications, the dismissal of Kautz's application will not make Fisher's application grantable until those questions are resolved.

6. Accordingly, for the reasons stated, the informal objections filed herein by MST and NETC ARE GRANTED, Kautz's request for waiver of Section 73.610 of the Commission's Rules IS DENIED, and Kautz's above-captioned application IS DISMISSED pursuant to Section 73.3564(b) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

FOOTNOTES

[1] Much of Kautz's waiver request is devoted to his views on what should be done about the channel 12 allotment to Lamar. That may be a proper question to raise in a Rule Making proceeding, but it is not a matter to be considered here.

[2] Kautz's specified site is not short-spaced to Station KWCH-TV in Hutchinson.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re application of

AUSTIN MOVIE AND SPORTS CABLE, INC. File No. 50057-CM-P-89

For a conditional license for a new MDS station on Channel 2A in Austin, Texas

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 1989; Released: August 8, 1989

By the Chief, Domestic Facilities Division:

1. Before the Division is the above-referenced application of Austin Movie and Sports Cable, Inc. ("AMSC") to construct a new Multipoint Distribution Service (MDS) station on Channel 2A in Austin, Texas. The frequencies allocated to Channel 2A are located in the 2156 MHz - 2160 MHz band with a 4 MHz bandwidth. The application is opposed by the adjacent Channel 1 licensee of station WJM66, Texas Wired Music, Inc. ("TWM"). Channel 1 frequencies are assigned in the 2150 MHz - 2156 MHz band. TWM uses only the aural segment of Channel 1 (2150.25 MHz) to provide a "background-music" service to subscribers. TWM transmits a "color bar" for the video portion of the signal for which there are no apparent subscribers at this time. AMSC and TWM have filed responsive pleadings.[1] In addition, AMSC filed a Petition for Expedited Consideration of the issues raised by the previously filed pleadings on April 20, 1989. According to the Commission's records, TWM did not file a response to this latest pleading.

I. BACKGROUND

2. AMSC's application, as amended, proposes to construct and operate a Channel 2A facility from a site located approximately 6 miles to the west northwest of TWM's Channel 1 transmitter site[2]. AMSC intends to use a portion of the Channal 2A bandwidth to carry data signals at a carrier frequency of 2159.75 MHz, with a deviation of ± 75 KHz, to control video channels to be provided over Multichannel MDS (MMDS) and Instructional Television Fixed Service (ITFS) systems. To accomplish this, AMSC plans to employ the General Electric Company (GE) Proband system with a Frequency Shift Key (FSK) data carrier to transmit internal system management information, such as channel mapping information, pay-per-view authorizations, and converter enable/disable commands. AMSC asserts that use of the Proband system will involve no more cochannel or adjacent channel interference than the standard NTSC transmission. The data carrier frequency of 2159.75 MHz would be 3.75 MHz up from the channel edge (2156 MHz) of Channel 1. ASMC states that it has no present plans to utilize the other segment of Channel 2A.

3. Section 21.902(d)(1) of the Commission's Rules, 47 C.F.R. § 21.902 (d)(1), provides that an MDS station utilizing an antenna with an omnidirectional radiation pattern shall be protected from harmful electrical interference 15 miles from its transmitter site. Section 21.902(f)(2) of the rules defines adjacent channel interference as the ratio of the desired signal to undesired signal present in an adjacent channel, at the output of a reference receiving antenna oriented to receive the maximum desired signal level. Undesirable adjacent channel interference between two MDS adjacent channel stations will occur when the ratio of the desired signal to undesired signal measured at the output of a standard antenna oriented to receive the maximum desired signal is less than 0 dB. 47 C.F.R. § 21.902 (f)(2).

4. Adjacent channel interference can occur when the reception equipment produces either a visual or an aural output in response to an adjacent channel signal and when a transmitter emits a signal outside its assigned channel and within an adjacent channel. Whether a television receiver produces an undesirable output in response to an undesired adjacent channel signal is affected by several factors, including the design of the receiver and the level of signals received, and the out-of-band signals radiating from transmission equipment.[3]

5. In adopting technical rules for MDS adjacent channel operation, the Commission concluded that successful adjacent channel operation can be achieved using MDS Channels 1 and 2 if the transmitting antennas are colocated, cross-polarized, and have the same Effective Isotropically Radiated Powers (EIRPs), and if receiving antennas can provide 20 dB of cross-polarization discrimination, even though Section 21.902 (f) only requires a 0 dB ratio of desired signal to undesired signal strength for interference-free operation.[4] However, where the transmitters are not colocated, the Commission recognized that

> "there will always exist an area surrounding the undesired transmitter where it will be virturally impossible to receive an interference free picture. The size of the area can be reduced by carefully engineering but there will always be some area in which the harmful adjacent channel interference will occur."

98 FCC 2d 68, 115.

In recognizing that non-colocated adjacent channel operation may not be interference-free, the Commission's rules require that all proposals to operate a non-colocated adjacent channel MDS station within the protected service area of an authorized adjacent channel station must include an interference analysis that

> (1) identifies the areas within the protected service areas of both the authorized adjacent channel station and the proposed station that cannot be protected, and
>
> (2) explains why the proposed station cannot be colocated with the existing station.

47 C.F.R. § 21.902(c)(3).

II. CONTENTIONS OF THE PARTIES

6. TWM objects to the grant of AMSC's application on the grounds that the facility will allegedly cause harmful interference to the reception signals of Channel 1 within its 15 mile protected service area, specifically 8.4 miles from the Channel 1 transmitter. It claims that AMSC's application and accompanying engineering analysis is flawed because it 1) fails to explain why co-location with the Channel 1 transmitter is not proposed, 2) fails to consider the significant depolarization effect that will occur as the result of the large separation between the TWM transmitter and the proposed Channel 2A transmitter, 3) does not address the interference impact on its own proposed Channel 2A facility and 4) fails to address the impact of out-of-band emissions. TWM raises particular concern regarding the appropriateness of AMSC's reliance on a 20 dB cross-polarization discrimination relative to its station. Station WJM66 is authorized to transmit a vertically polarized signal and its receive locations are all vertically polarized. AMSC intends to use horizontally polarized transmitting and receiving antennas on its proposed facility. TWM maintains that cross-polarization discrimination decreases with increased propagation path length. To support this position, it relies on a study by Dr. William Kincheloe of Stanford University that suggests cross-polarization to achieve adjacent channel operation is inappropriate because there is likely to be significant signal depolarization when the propagation path exceeds 7 miles. TWM argues that given the large separation between the authorized and proposed facilities, no reliance should be placed on polarization discrimination. Thus, it claims that adjacent channel interference can be expected "to a distance as great as 8.4 miles from the station WJM66 transmitter, or 2.4 miles beyond the AMSC transmitter location." Petition to Deny, Engineering Statement at 2.

7. In response, AMSC states that colocation with the Channel 1 transmitter is not practical due to the lack of space at the Channel 1 site to accommodate the number of transmitters and antennas required by AMSC. Consequently, AMSC, through an affiliate, has acquired a site upon which a new tower will be constructed to support its facilities.[5]

8. AMSC refutes TWMS's contention that significant depolarization will occur. Its analysis shows while the operation of the proposed facility may not be interference-free, the area that may be subject to adjacent channel interference within station WJM66's 15-mile protected service area is a radius of approximately 0.16 miles (845 feet) around the proposed Channel 2A antenna site. It observes that currently no Channel 1 receivers have been identified in this area either through its analysis or the analysis conducted by TWM. It describes this area as a rural, light industrial area with few potential subscriber locations. Based on terrain studies, the relative locations of both facilities and the use of directional receiving antennas, AMSC concludes that the operation of the proposed Channel 2A station should not cause harmful interference to Channel 1 subscribers. To the extent there is the potential for interference within 0.16 miles of the proposed tower, AMSC pledges to conduct an actual survey of Channel 1 subscribers within 0.1 miles of the proposed Channel 2A site and to fully cooperate with TWM to eliminate or reduce any interference.[6]

9. In response to TWM's concerns regarding the potential interference impact of the proposed operation on its own facility, AMSC acknowledges that given the disparity in EIRP powers (62 dBm for Channel 1 and 51 dBm for Channel 2A) interference to the Channel 2A operation is likely, inasmuch as the proposed Channel 2A station signal strength is 11 dB less than the signal strength of the proposed Channel 2A. To compensate for this difference in EIRPs, AMSC suggests it may be necessary to use larger receiving antennas and take advantage of some shadowing by buildings from the MDS Channel 1 antenna to resolve any interference. AMSC further claims that the area subject to adjacent channel interference within the proposed Channel 2A service area is an area with a radius of approximately 2.2 miles around the Channel 1 antenna site. Opposition, Interference Analysis at 2. ASMC also states it will accept any interference that Channel 1 causes it due to the unequal signal strengths. Opposition at 4.

10. TWM also claims that ASMC's interference analysis fails to address the impact of out-of-band Channel 2A emissions within Channel 1's passband. AMSC claims that the Proband system meets or exceeds all requirements for out-of-band spurious emissions.

III. DISCUSSION

11. Section 21.902 (a) of the rules expressly provides, *inter alia*, that applicants and licensees "shall make exceptional efforts to avoid harmful interference to other users and to avoid blocking potential adjacent channel use in the same city and cochannel use in nearby cities . . . and are expected to cooperate fully in attempting to resolve problems of potential interference . . . ." 47 C.F.R. § 21.902(a). This rule section places the primary responsibility for resolving interference problems on the parties. All parties are expected to exercise good faith efforts to comply with this mandate. The pleadings reflect the representations made by both AMSC and TWM to attempt to resolve adjacent channel interference problems, prior to bringing these matters to the attention of the Commission. Despite their present adversarial posture, both parties have stated their willingness to resolve any future interference problems, should the need arise, to enable the operation of both the Channel 1 and Channel 2A facilities. The duty imposed by Section 21.902(a) is an ongoing one applicable to MDS applicants and licensees alike. Both TWM and ASMC are expected to continue to act with good faith and diligence as contemplated by this rule section so that the services provided to the public are maximized.

12. Although a proposed MDS station licensee is generally required to design its facility in a manner that does not interfere with the protected service area of an authorized station, the Commission, in adopting technical rules permitting the operation of adjacent channel MDS facilities, recognized the inherent difficulties in the operation of non-colocated adjacent channel stations. It further acknowledged that the ability to achieve successful adjacent channel operation becomes even more technically complex when both stations are not proposed at approximately the same time as in the instant case. Consequently, the Commission established a policy regarding adjacent channel operation that permits flexibility in adjacent channel transmitter location. This policy is reflected in Section 21.902(c)(3) of the rules that requires the adjacent channel applicant to show the effect its proposed opera-

tion will have on an authorized station. All applicants proposing non-colocated adjacent channel facilities must first show why colocation with the authorized transmitter is not feasible, and second, show how much interference will be caused by the proposed non-colocated facility.

13. Although ASMC's original application did not provide a statement concerning the feasibility of colocation with the existing Channel 1 transmitter, an explanation of why colocation with the Channel 1 transmitter is not possible was proffered in its responsive pleadings.[7] Based upon this explanation, we find that AMSC has adequately explained, as required by Section 21.902(c)(3), why the proposed facility cannot be colocated with WMJ66.

14. In the case of point-to-multipoint facilities, such as MDS, where energy usually is transmitted in an omnidirectional manner, the likelihood for random scattering and depolarization of the signal exists. As AMSC noted, depolarization effects may result from stray reflections too close to the receive site or reflections from surfaces far removed from the receive site. However, measures may be employed to mitigate the effect of depolarization and the resulting interference, *e.g.*, colocation and cross-polarization of transmit antennas and equalizing transmission signal strengths. Here, colocation of the two transmitters is not feasible and the EIRP of the Channel 1 and the EIRP of the proposed Channel 2A facility are of unequal signal strengths. TWM is correct that the likelihood of achieving significant cross-polarization discrimination (15-20 dB) decreases as the propagation path length increases. Nonetheless, all cross-polarization should not be discounted. Nor do we ascribe to the view that there will be harmful adjacent channel interference at sites located more than 7 miles from the transmitters where significant depolarization of the signal is more likely to occur. As the Commission previously stated in discussing the Kincheloe study referred to by TWM,

> "adjacent channel interference is greater near the undesired station and because the desired and undesired transmitters are to be located near each other, significant depolarization is not likely to occur between the transmitters and the receiving sites where cross-polarization discrimination is most needed; that is near the undesired transmitter . . . . It is reasonable to expect television receivers to operate successfully even when the undesired signed *exceeds* the desired signal by as much as 5 dB."

98 FCC 2d 68, 114.

15. Even if all the advantages of cross-polarization are not available, the likelihood of adjacent channel interference should be reduced due to the following considerations: first, the large degree of separation between the carrier frequencies employed by TWM and ASMC. TWM operates on carrier frequency, 2159.75 MHz and AMSC proposes to operate on carrier frequency, 2150.50 MHz. Thus, the proposed Channel 2A station will operate nearly 9.25 MHz from the carrier frequency used by Channel 1. Second, even though an absolute 20 dB of polarization discrimination may not be achieved everywhere, some cross-polarization discrimination should be available. Third, the 20 db differential in signal strengths will benefit TWM's signal. Even if the 20 dB benefit of cross-polarization is not realized, the EIRP of the data channel will be 0.1 watt, making it more likely than not that the area subject to interference (within a radius of 845 feet around the proposed Channel 2A tower) will be extremely close to the Channel 2A tower. AMSC has stated its willingness to accept any resulting interference to its facility resulting from the difference in signal strengths of both operations. Fourth, as ASMC notes, the performance characteristics of the Johnson Electronic FM receiver/amplifier typically used by TWM rejects a signal at 2150.45 MHz by 65 dB. The signal rejection increases as the interfering signal is removed. Thus, a ASMC states, it is reasonable to assume that the rejection level here will be even greater because there is 9.5 MHz of spectrum spacing between the two carriers. Under these circumstances, little or no harmful interference would occur, even if the advantages to cross-polarization are not realized.

16. Finally, TWM correctly observes that, as a general matter, the radiation of out-of-band emissions by station transmitters may affect the operation of adjacent channel stations. Section 21.908 of the rules requires that a transmitter rated 10 or more watts (for example, a standard MDS transmitter) must attenuate all out-of-band emissions at 40 dB below the peak visual signal. This assumes, however, that the transmitters are co-located. However, it is also generally believed that if cross-polarized adjacent channel antennas are used, there could be as much as 20 dB additional attenuation of out-of-band emissions by the receiving antennas, effectively reducing the level of the undesired signal to 60 dB below the desired signal. The use of transmitters that achieve more than the required level of out-of-band suppression has been generally recommended by the Commission as a means of mitigating harmful interference. At the same time, the Commission has stated that where adjacent channel transmitters are not co-located, the probability of out-of-band emissions causing harmful interference increases. Furthermore, the Commission has stated that "there will always be an area in the vicinity of a non-colocated adjacent channel station in which the out-of band emission will cause harmful interference. Reducing these emissions . . . will reduce the size of [the area of interference], but it [will not] be eliminated."[8] Consequently, under these circumstances, there may always be a potential source of harmful interference.

17. Based on the foregoing discussion, we believe the interference impact on AMSC's proposal, as amended, will be minimal. It is possible that some of its receivers could receive harmful interference from the Channel 2 signal; however, this impact is minimized by AMSC's proposed use of only a small segment of the 4 MHz bandwidth of Channel 2A. AMSC states it has no intention, at this time, of operating a carrier frequency closer than 3.75 MHz with a deviation of ± 0.75 KHz from the band edge of Channel 1. It further indicates that it will also make any technical adjustment to its receive facilities to eliminate any harmful interference, *e.g.*, the use of larger receive antennas, receivers with high selectivity, or cross-polarized antennas (horizontal for Channel 2A and vertical for Channel 2). Also, AMSC has agreed to accept any interference from the Channel 2A signal. Given the apparent willingness of the parties to comply with the Section 21.902(a) mandate to resolve cooperatively potential interference problems, it appears AMSC's application should be granted.

18. Accordingly, IT IS ORDERED THAT, the Petition to Deny filed by Texas Wired Music, Inc. IS DENIED and the application of Austin Movie and Sports Cable, Inc. IS GRANTED consistent with the technical specifications contained in its proposal, to the extent the proposal demonstrates that (1) the operation of the Channel 2A facility will not cause harmful interference to identified subscribers of Texas Wired Music in the Austin area, (2) Austin Movie and Sport Cable Inc. will fully cooperate in good faith to resolve interference problems in areas where there are currently no known subscribers to TWM's system, but the potential for interference exist, and (3) Austin Movie and Sports Cable will unequivocably accept any interference to its own facility that results from the operation of the Channel 2A station. In addition, IT IS FURTHER ORDERED THAT should the Channel 2A facility cause interference to the operation of Texas Wired Music's Channel 1 facility, Austin Movie and Sports Cable shall cease all operation of the Channel 2A station, pending resolution of the interference problem, and shall obtain prior Commission approval of the resolution of the interference problems before commencing operation of the facility.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] TWM filed a Petition to Deny AMSC's application on February 24, 1989. AMSC and TWM on March 9 and 21, 1989 filed an Opposition and Reply, respectively.

[2] On April 20,1989, AMSC filed an amended application proposing the use of an Information Transmission Systems Corp. transmitter, Model No. 73A04404 with an emission designator 4MOOFID. The transmitter output is 10 watts (0.1 watts actual after 10 dB pad and 10 dB coupler). The proposed transmitter was type-accepted by the Commission on July 10, 1989.

[3] Amendment of Parts 21, 74, and 94 of the Commission's Rules and Regulations with regard to the technical requirements applicable to the Multipoint Distribution Service, the Instructional Television Fixed Service and the Private Operational-Fixed Microwave Service, 98 FCC 2d 68, 77 (1984).

[4] 98 FCC 2d at 118.

[5] Opposition at 2.

[6] *See* Opposition to Petition to Deny and Petition for Expedited Consideration.

[7] *See* para. 7.

[8] 98 FCC 2d at 118.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 19, 1989 **C7-148**

Released: August 8, 1989

Robert A. Dwyer
President
Dwyer Broadcasting, Inc.
1400 Colonial Blvd., Suite 213
Fort Myers, Florida 33907

Dear Mr. Dwyer:

This refers to your applications for renewal of license for stations WOOJ/WOOJ-FM, Lehigh Acres, Florida, and a petition to deny filed by the Florida State Conference of Branches of the NAACP, its branches operating in your service area, and the National Black Media Coalition. While the petitioners have withdrawn the petition and asked the Commission to renew your licenses, it is our practice to review all stations' Equal Employment Opportunity (EEO) program and performance pursuant to Section 309 of the Communications Act of 1934. That review has revealed a failure to comply with the Commission's EEO rule. Accordingly, this letter constitutes a Notice of Apparent Liability for a forfeiture issued pursuant to Section 503 of the Communications Act of 1934.

Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and that it establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit and promote qualified minorities and women and the licensee's on-going assessment of its EEO efforts. This enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool for each hiring opportunity.

When the renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, it is granted, if otherwise appropriate. When the application indicates evidence of discrimination or an inadequate record of EEO efforts, the Commission may impose a variety of sanctions, such as reporting conditions, renewal for less than a full term, forfeiture or a combination thereof. Further, the Commission may designate the renewal application for hearing where the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO*).

Our review of your renewal application reveals no evidence of intentional discrimination but does reveal an inadequate record of EEO efforts. The available labor force for the Fort Myers, Florida Metropolitan Statistical Area includes 10.4% minorities (7.1% Black, 2.7% Hispanic, 0.6% other). Review of the Annual Employment Reports during the license term indicates that you employed one minority, an American Indian, in 1983 and one Black in January 1989, after your renewal application was filed. In no other years during the license term were minorities reported on your full-time staff. From 1986 through 1988, you had 35 full-time hiring opportunities but failed to recruit or hire minorities for any of these vacancies. You admit that you did not recruit minorities as vacancies occurred. Other than two unsuccessful attempts in December 1986 to recruit minorities for available job opportunities, your recruitment efforts consisted of mailing a general recruitment letter to 45 minority and female recruitment sources annually for three years, without mentioning specific job openings, and contacting a local community leader in January 1989 -- the last month of the license term.[1] While the contact with the community leader in the last month of the license term resulted in one hire, your general recruitment letters produced only one referral -- in January 1989. Despite this unproductive record, you made no attempt to modify your EEO efforts until the last month of the license term. It does not appear that you undertook a continual and meaningful self-evaluation of your EEO program as required by the rules.

In view of the foregoing and our review of pertinent case precedent in this area, we conclude that the renewal applications for stations WOOJ/WOOJ-FM should be granted for a full license term, subject to reporting conditions and a $15,000 forfeiture. First, unlike *Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988) (*Beaumont*), the instant record does not warrant designation for an evidentiary hearing. In *Beaumont*, designation was required, *inter alia*, because the information before the Commission raised substantial questions as to whether the departure of five full-time and six part-time Black employees from the station was the result of discrimination. *Id.* at 507-510. Specifically, the licensee's several responses to Commission inquiries on this subject were contradictory and disputed by a petitioner. *Id.* at 504-506. By way of contrast, in the present case there is no question regarding the suspicious departure of minority employees and there is no evidence of intentional discrimination. Thus, it appears that the instant case is less egregious than *Beaumont*, *supra*.

It also appears that the instant case is less egregious than the record in *Woolfson Broadcasting, Inc.*, FCC 89-165 (released: June 9, 1989) (*WSBY/WQHQ-FM*), where we granted the license for less than a full-term subject to reporting conditions and imposed a forfeiture of $15,000. Efforts toward implementing the EEO programs of both stations, although different in kind, were marginal at best. The annual contacts in the present case and the minimal recruitment for specific positions by *WSBY/WQHQ* in the closing months of the license term are both deficient. Moreover, both the station size and the number of full-time hiring opportunities in the present case and *WSBY/WQHQ* are similar. However, while unsuccessful, the licensee here did make some efforts to recruit minorities at various times throughout the license term, whereas *WSBY* made no efforts until the end of the license term. Further, your stations, which are located in an area with less than half of the Black labor force of *WSBY/WQHQ*, did hire a Black during the license term -- albeit in the last month after the petition was filed. Thus, while we find that the present case warrants reporting

conditions and a forfeiture of $15,000 as in *WSBY/WQHQ*, we do not believe that imposition of a short-term renewal is appropriate. On the other hand, this case is more egregious than *WROV Broadcasters, Inc.*, FCC 89-164 (released: June 9, 1989) (*WROV*), where we granted a full-term renewal, subject to reporting conditions, and a $5,000 forfeiture. Unlike *WROV*, you failed to contact minority referral sources for specific job vacancies. While you did contact referral sources, including minority sources, on an annual basis, those contacts were not geared toward specific job openings as contemplated by our regulations. *See* 73.2080 (c)(2). Therefore, while reporting conditions and a forfeiture are in order, a forfeiture greater than that imposed in *WROV* is warranted.

The evidence has shown that there were repeated failures to comply with the Commission's affirmative action provisions set forth in Section 73.2080(b)(3) and (5) and 73.2080(c)(3) and (5) of the rules. Accordingly, while we find that the grant of the applications will serve the public interest, we also find it appropriate to grant the license renewal applications for WOOJ/WOOJ-FM for a full license term, subject to periodic reporting conditions.[2] We also find it appropriate to impose a forfeiture of $15,000 on the present licensee of WOOJ/WOOJ-FM for past rule violations.

Accordingly, IT IS ORDERED, That the applications for renewal of license of Stations WOOJ/WOOJ-FM ARE GRANTED, subject to the reporting conditions specified herein.

IT IS FURTHER ORDERED, That the application to assign the license of station WOOJ-FM, subject to the reporting conditions specified herein, from Robert A. Dwyer to Sandab Communications of Fort Myers, Limited Partnership IS GRANTED.

IT IS FURTHER ORDERED, That, pursuant to Section 503 of the Communications Act of 1934, as Amended, Robert A. Dwyer, licensee of WOOJ/WOOJ-FM, is hereby advised of his apparent liability for forfeiture of $15,000 for reported failures to comply with section 73.2080 of the Commission's Rules in the manner described above.

IT IS FURTHER ORDERED, That the licensee of station WOOJ(AM) and the new licensee of station WOOJ-FM, submit an original and one copy of the following information on October 1, 1990, October 1, 1991, and October 1, 1992:

(a) For the October 1, 1990 report, a list of all job vacancies during the twelve months preceding September 1, 1990, and for the October 1, 1991 and October 1, 1992 reports, a list covering the 12 months preceding September 1, 1990 and September 1, 1992, respectively, indicating job title and full or part-time status of the position, the race and national origin, sex and the referral source of each applicant for each position and the race or national origin and sex of the person hired.

(b) a list of employees as of the September 1, 1990 payroll period for the first report, and as of the the September 1, 1991 and September 1, 1992 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid to the lowest paid job classification), date of hire, sex and race or national origin; and

(c) details concerning the stations' efforts to recruit minorities for each position filled during the 12 month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

In addition, you may submit any information you believe is relevant with regard to the stations' EEO program and your efforts thereunder. The reports are to be filed with the Secretary of the Commission to the attention of the Mass Media Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may call the Mass Media Bureau's EEO Branch (202-632-7069). Regarding the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter. Any comments relating to your ability to pay should include those financial letters set forth in the noted attachment.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Minority sources contacted include: NAACP, Tampa Urban League, Latin Chamber of Commerce and Florida A&M University.

[2] In this regard, we are mindful of an assignment of license for WOOJ-FM from Robert A. Dwyer to Sandab Communications of Fort Myers, Limited Partnership (File No. BAPLH 890320HK). The reporting conditions apply to the assignee upon the consummation of the sale. *See* WSBY/WQHQ.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-323

In the Matter of

CINCINNATI BELL TELEPHONE COMPANY TARIFF F.C.C. No. 35 — Transmittal No. 518

ORDER

Adopted: July 31, 1989; Released: August 8, 1989

By the Chief, Common Carrier Bureau:

1. On July 27, 1989, Cincinnati Bell Telephone Company (Cincinnati Bell) filed a motion for a 14-day extension of time to file the direct case required by the Bureau's July 19, 1989, Order[1] in the above-captioned matter. Its Direct Case is currently due no later than August 9, 1989.

2. Cincinnati Bell asserts that several individuals whose input will be required to address adequately a number of complex issues in the direct case are presently unavailable to assist in its preparation. Cincinnati Bell Motion at 1. Cincinnati Bell also asserts that counsel for US Sprint Communications Company Limited Partnership (US Sprint) has been contacted and has no objection to its request for an extension of time. *Id.*

3. The Common Carrier Bureau has reviewed Cincinnati Bell's motion and concluded it has demonstrated good cause for the 14-day extension it requests. Therefore, its direct case in response to the *July 19 Order* must be filed no later than **August 23, 1989.** Comments and Oppositions regarding Cincinnati Bell's direct case may be filed by interested parties no later than **September 7, 1989.** Cincinnati Bell may file a rebuttal to any oppositions or comments no later than **September 14, 1989.**

4. Accordingly, IT IS ORDERED that the motion for extension of time filed by Cincinnati Bell Telephone Company with regard to the above-captioned proceeding IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] Cincinnati Bell Telephone, Tariff F.C.C. No. 35, Transmittal No. 518, CC Docket 89-323, Order Designating Issues for Investigation (DA 89-838), released July 19, 1989 (Com.Car.Bur.) *(July 19 Order).*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-342

In the Matter of

Amendment of Section 73.202(b), RM-6740
Table of Allotments,
FM Broadcast Stations.
(Monahans, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 19, 1989; Released: August 9, 1989

By the Chief, Allocations Branch:

1. At the request of Rusk Corporation (petitioner), licensee of Station KWES(FM), Channel 271C1, Monahans, Texas, the Commission has before it for consideration a petition for rule making seeking the substitution of Channel 271C for Channel 271C1 at Monahans. Additionally, petitioner seeks the modification of its station's license to specify operation on the higher powered frequency. Petitioner states its intention to implement the new expanded FM service to the area, if permitted.

2. The channel substitution can be made in compliance with the Commission's minimum distance separation requirements at the site specified by the petitioner.[1] Mexican concurrence in the allotment has been obtained since Monahans is located within 320 kilometers (199 miles) of the U.S.- Mexican border.

3. As requested, we shall propose to modify the license of Station KWES(FM) at Monahans, Texas, to specify operation on Channel 271C in lieu of Channel 271C1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Monahans.

4. Accordingly, in order to provide Monahans with expanded coverage area FM service, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Monahans, Texas	260C1, 271C1	260C1, 271C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 2, 1989**, and reply comments on or before **October 17, 1989**, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Nancy L. Wolf, Esquire
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D. C. 20037
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Petitioner proposes to utilize its station's current transmitter site of its construction permit which is located 42.6 kilometers (26.1 miles) north of Monahans. The restricted site coordinates are 31-57-55 and 102-46-10.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-264

In the Matter of

Amendment of Section 73.606(b), RM-6160
Table of Allotments,
TV Broadcast Stations.
(Gosnell, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 19, 1989; Released: August 9, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 3 FCC Rcd 3637 (1988), issued in response to a petition filed on behalf of Gosnell School District 6 (petitioner), proposing the allotment of UHF television Channel 46 to Gosnell, Arkansas, as that community's first local television service. Petitioner filed comments and a counterproposal[1] in response to the *Notice*. No other comments were received.

2. The counterproposal filed by petitioner requests the allotment of Channel 46 to Gosnell, Arkansas, on a reserved basis, for noncommercial educational use, rather than as a commercial allotment.[2]

3. In consideration of the above, and in the absence of any objections to petitioner's modified proposal, we believe the public interest would be served by allotting Channel 46 to Gosnell, for noncommercial educational use.

4. A staff engineering analysis has determined that Channel *46 can be allotted to Gosnell, Arkansas, in conformity with the Commission's Rules and policies, provided the transmitter is restricted to an area at least 8 kilometers (5 miles) south[3] of the community, with a carrier offset, to avoid short-spacing on the co-channel to Station WVCL(TV), Channel 46, East St. Louis, Illinois.[4]

5. It should be noted that although the Commission has imposed a freeze on television allotments or applications therefor in certain metropolitan areas, Gosnell is not one of the affected areas. *See Order*, 52 FR 28346 (July 29, 1987).

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 25, 1989,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Gosnell, Arkansas	*46+

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the application filing process should be addressed to the Video Services Division, Television Branch, Mass Media Bureau, (202) 632-6357.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the counterproposal was given September 23, 1988, Report No. 1750.

[2] We note that in its initial proposal, petitioner stated that the Gosnell School District Board desired to establish a television broadcast facility for use in conjunction with the educational programming of local schools. Petitioner advised that although the school presently maintains a program of training in television production techniques, it is limited in its ability to distribute such programming due to the lack of an over-the-air facility. Thus, we believe that, based on petitioner's intended use of the channel, its request for a reserved facility is more appropriate than its use for commercial application.

[3] Coordinates at the restricted site for Channel *46 at Gosnell, Arkansas, are 35-53-13 and 89-57-18.

[4] Coordinates at the transmitter site specified in a pending modification application for Station WVCL(TV) are 38-23-18 and 90-29-16 (BMPCT-871210KF). The site restriction is not required based on the presently authorized transmitter site for Station WVCL(TV), which is located in Zone 1, requiring a separation of 155 miles. However, the instant proposal and the transmitter site specified in the pending modification application for Station WVCL(TV) are both located in Zone 2, where a minimum distance separation of 175 miles is required.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-341

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Warrenton, North Carolina, and Alberta, Virginia)	RM-6775

NOTICE OF PROPOSED RULE MAKING

Adopted: July 19, 1989; Released: August 9, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Warrenton Broadcasting Corporation (petitioner), requesting the substitution of Channel 297C2 for Channel 297A at Warrenton, North Carolina, the modification of its construction permit for Station WVRS(FM) to specify the higher powered channel, and the substitution of Channel 276A for unoccupied but applied for Channel 299A at Alberta, Virginia. Petitioner states that it will apply for Channel 297C2 at Warrenton, if allotted.

2. Petitioner notes that the only application for Channel 299A at Alberta which has been accepted for filing and cut-off was filed by FM 108 Corporation (BPH-880531NC). It goes on to point out that FM 108 Corporation is under common control with Warrenton Broadcasting Corporation and both are represented by the same counsel. Therefore, it states that petitioner can attest that FM 108 Corporation has no objection to the proposed substitution of channels at Alberta.

3. Channel 297C2 can be allotted to Warrenton, North Carolina, in compliance with the Commission's minimum distance separation requirements with a site restriction of 29.3 kilometers (18.2 miles) northeast to avoid a short-spacing to Station WFXC, Channel 296A, Durham, North Carolina, and to the pending application of Station WKZL, Channel 298C, Winston-Salem, North Carolina. Channel 276A can be allotted to Alberta, Virginia, in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] As requested, we shall also propose to modify petitioner's construction permit for Station WVRS(FM) at Warrenton to specify operation on Channel 297C2. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 297C2 at Warrenton or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. Further, if the proposals advanced herein are ultimately adopted, FM 108 Corporation will be permitted to amend its application to specify Channel 276A without loss of cut-off protection.

4. We believe the public interest would be served by proposing the substitution of Channel 297C2 for Channel 297A at Warrenton, North Carolina, and the substitution of Channel 276A for Channel 299A at Alberta, Virginia, since it could enable Station WVRS(FM) to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Warrenton, North Carolina	297A	297C2
Alberta, Virginia	299A	276A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 2, 1989,** and reply comments on or before **October 17, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David M. Hunsaker, Esq.
Putbrese, Hunsaker & Ruddy
6800 Fleetwood Road, Suite 100
P.O. Box 539
McLean, Virginia 22101
(Counsel to petitioner)

7. IT IS ORDERED, That the Commission SHALL SEND a copy of this *Notice of Proposed Rule Making* to the applicant for Channel 299A at Alberta, Virginia, as follows: FM 108 Corporation, 645 Church Street, 400, Norfolk, Virginia 23510.

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction

of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 297C2 at Warrenton are North Latitude 36-34-11 and West Longitude 77-54-16. The coordinates for Channel 276A at Alberta are North Latitude 36-51-48 and West Longitude 77-53-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-343

In the Matter of

Amendment of Section 73.202(b), RM-6761
Table of Allotments,
FM Broadcast Stations.
(Dresden, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 19, 1989; Released: August 9, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration at the request of Valley View Broadcasting, Inc.(petitioner), is a petition for rule making seeking the allotment of Channel 239A to Dresden, Tennessee, as that community's first local FM service. Petitioner states an intention to apply for the channel, if allotted.

2. Our engineering analysis reveals that the proposed allotment of Channel 239A to Dresden is mutually exclusive with a proposal to substitute Channel 239A for Channel 240A at Henderson, Tennessee.[1] Therefore, in order to resolve the conflict and permit full consideration of both proposals, we have determined that Channel 236A is available for consideration at Dresden. Channel 236A can be allotted to Dresden in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.4 kilometers (2.1 miles) south of the city.[2] The restriction is required in order to avoid a short spacing to Station WXID(FM), Channel 234C2 at Mayfield, Kentucky.

3. In view of the fact that Dresden, Tennessee, could receive its first local FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Dresden, Tennessee	---	236A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 2, 1989,** and reply comments on or before **October 17, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Jerrold Miller, Esquire
Miller & Fields, P.C.
P. O. Box 33003
Washington, D. C. 20033
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The Henderson proposal is requested in conjunction with a proposal to upgrade the facilities of Station WRIK(FM) at Metropolis, Illinois. *See* RM-6700.

[2] The restricted site coordinates are 36-15-39 and 88-42-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-344

In the Matter of

Amendment of Section 73.202(b), RM-6674
Table of Allotments,
FM Broadcast Stations.
(Rosamond, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 18, 1989; Released: August 9, 1989

By the Chief, Allocations Branch:

1. A petition for rule making has been filed on behalf of P. Dale Ware (petitioner) seeking the allotment of FM Channel 240A to Rosamond, California, as that community's first local broadcast service. In order to accommodate the proposal, petitioner seeks the substitution of Channel 241A for Channel 240A at Barstow, California.

2. A staff analysis reveals that Channel 240A at Rosamond conflicts with two separately-filed proposals for the use of Channel 240B1 at Barstow and Camarillo, California,[1] which are compatible. The distance between Rosamond and the Barstow and Camarillo proposals is 104 kilometers and 121 kilometers respectively, whereas 138 kilometers is required between Class A and B1 cochannels. Thus, we sought an alternate channel for Rosamond. As a result, we have determined that Channel 228A can be allotted to Rosamond in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 11.8 kilometers (7.3 miles) northwest[2] of the community to avoid short-spacing to Station KFOX(FM), Channel 228A, Redondo Beach, California.[3] However, since Rosamond is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain concurrence of that Government in the proposal.

3. In view of the fact that Rosamond could receive a first local broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Rosamond, California	--	228A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 2, 1989,** and reply comments on or before **October 17, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Harry P. Warner, Esq.
Law Offices of Harry P. Warner
6455 Hayes Drive
Los Angeles, CA 90048

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Hub Broadcasting, Inc., permittee of Station KXXZ(FM), Channel 240A, Barstow, California, seeks to modify its facilities to specify operation on Channel 240B1 at coordinates 34-58-15 and 117-02-21 (RM-6678). Golden Bear Broadcasting, Inc., licensee of Station KZTR-FM, Channel 240A, Camarillo, California, seeks to modify its license to specify operation on Channel 240B1 at coordinates 34-13-21 and 119-13-48 (RM-6678).

[2] Coordinates used for Channel 228A at Rosamond are 34-56-56 and 118-14-07.

[3] Coordinates at the licensed site of Station KFOX(FM) are 33-48-16 and 118-22-02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-350

In re Applications of

EMISION DE RADIO BALMESEDA, INC. (hereafter "Emision")	File No. BPH-870505MA
SAFE CARE, INC. (hereafter "SCI")	File No. BPH-870505MB
STEPHEN G. MCGOWAN (hereafter "McGowan")	File No. BPH-870506ME
PONTE VEDRA BROADCASTING, INC. (hereafter "PVBI")	File No. BPH-870506MF
TALLAHASSEE BROADCASTING CO. (hereafter "TBC")	File No. BPH-870506MG
CHAMELEON BROADCASTING, INC. (hereafter "CBI")	File No. BPH-870506MH
SUNSTAR COMMUNICATIONS, INC. (hereafter "Sunstar")	File No. BPH-870506MI
DALE BROADCASTING, INC. (hereafter "DBI")	File No. BPH-870506MK
PONTE VEDRA RADIO CORPORATION (hereafter "PVRC")	File No. BPH-870506ML
RONALD SCOTT PERRY (hereafter "Perry")	File No. BPH-870506MM
FIRST COAST RADIO, INC. (hereafter "FCRI")	File No. BPH-870506MN
FLORIDA FM LIMITED PARTNERSHIP (hereafter "Florida")	File No. BPH-870506MO
MONROE E. BERKMAN AND SUZETTE M. BERKMAN (hereafter "Berkman")	File No. BPH-870506MP
LEEANN KENDALL SCOPINICH (hereafter "Scopinich")	File No. BPH-870506MQ

For Construction Permit
for a New FM Station
on Channel 293A (106.5 MHz)
in Ponte Vedra Beach, Florida

HEARING DESIGNATION ORDER

Adopted: July 25, 1989; **Released: August 9, 1989**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Florida*. Information before the Commission indicates that Florida was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise is a real party in interest in the subject applicant; whether or not the applicant's organizational structure is a sham; and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant dismissed its application rather than resolving these issues. These unresolved issues call into question Florida's qualification to be a Commission licensee. Therefore, such issues will be specified against Florida in this proceeding.

3. Item 5(e) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application in any pending or concluded Commission proceeding which left unresolved character issues against

the application." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. Florida has responded to Item 5(e) in the negative. However, Commission records indicate that Hadsell W. and Bernice Rich are limited partners in the above Rockledge, Florida proceeding. Additionally, R.L. Groat is a general partner in the above Sedona, Arizona proceeding and a limited partner in the Swanton, Ohio proceeding. However, Florida has failed to timely amend its application pursuant to 47 C.F.R. § 1.65 to notify the Commission of the outstanding character issues. Accordingly, an appropriate issue will be specified below.

4. *FCRI*. Section III of FCC Form 301 (financial qualifications) asks the applicant to certify whether or not sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue. A "yes" or "no" response is required. FCRI stated "not applicable." Accordingly, a financial qualifications issue will be specified below.

5. *PVBI*. Applicants for new broadcast stations are required by 47 C.F.R. § 73.3580 to give local notice of the filing of their applications. PVBI has published the required notice, but the notice is deficient. PVBI fails to give the street address of its proposed transmitter site. To remedy this deficiency, PVBI must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

6. *McGowan*. McGowan has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to Section IV of FCC Form 301. Accordingly, McGowan will be required to file, within 30 days of the release of this Order, a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

7. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although PVBI, FCRI, and Berkman have filed such statements, they are deficient. PVBI and Berkman have failed to identify specific sources of recruitment specializing in women candidates. FCRI failed to respond to Section V (Training). Accordingly, PVBI, FCRI, and Berkman will be required to file an amended EEO program with the presiding Administrative Law Judge, within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

8. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Emision, SCI, TBC, Sunstar, PVRC and FCRI have not completed Item 4 correctly. Emision's application, as amended on July 24, 1987, gives a post office box number as the residence address for the applicant. SCI, Sunstar, PVRC and FCRI did not list the applicant and the other required information for the applicant. TBC does not list the applicant and gives a post office box number as the residence address for all of its principals. Accordingly, Emision, SCI, TBC, Sunstar, PVRC and FCRI must each submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. On July 27, 1987, DBI timely amended its application to specify a new transmitter site. However, the amendment contains conflicting information. Section V-B, Items 7(a) and (b) indicates that the antenna radiation center above mean sea level is 411 meters, the antenna radiation center above ground is 58 meters and the overall tower height above ground is 63 meters. The tower sketch (Figure 3) shows the antenna radiation center above mean sea level as 104 meters, the antenna radiation center above ground as 97 meters and the overall tower height above ground as 97 meters. Consequently, we cannot confidently and reliably determine which set of data in the amendment is correct. We note, however, that the application, as originally tendered, was substantially complete. Since the "hard look" tenderability requirement pertains only to the application as originally tendered and not to subsequent amendments, DBI will be required to submit a corrective amendment to the presiding Administrative Law Judge within 30 days of the release of this Order. Upon clarification, the July 27, 1987 amendment will be considered by the Judge.

10. Michael Balanky and Holly Onosko are principals of CBI. Mr. Balanky is a sales manager and Ms. Onosko is a senior account executive at WFYV-FM, Atlantic Beach, Florida and WRQL(AM) in Jacksonville, Florida. Both parties have indicated their intent to terminate their relationship with Stations WFYV-FM and WRQL(AM) in the event of grant of the referenced application. Accordingly, an appropriate condition will be specified below.

11. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE AMENDMENTS FILED
Emision	October 19, 1987; December 4, 1987; January 27, 1988; April 18, 1988; May 18, 1988; September 26, 1988; March 25, 1988; July 15, 1988; November 17, 1988; February 1, 1989; March 21, 1989
McGowan	February 24, 1988; July 27, 1988
PVBI	September 15, 1987
TBC	November 23, 1987
DBI	August 10, 1987; December 7, 1987; March 3, 1988; March 16, 1988; May 19, 1988; November 22, 1988
PVRC	December 18, 1987; October 20, 1988 March 13, 1989

Florida	December 22, 1988
Berkman	October 1, 1987; July 14, 1988
Scopinich	December 14, 1987; August 31, 1988 December 16, 1988

12. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Florida.

2. To determine whether Florida's organizational structure is a sham.

3. To determine whether Florida violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to timely report the designation of character issues against other applicants in which one or more of its partners has an ownership interest and/or the dismissal of such ownership interest and/or the dismissal of such applications with unresolved character issues pending.

4. To determine, from the evidence adduced pursuant to Issues 1 through 3 above, whether Florida possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine with respect to FCRI, whether the applicant is financially qualified.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, PVBI shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished.

16. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, McGowan shall submit an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area.

17. IT IS FURTHER ORDERED, That within 30 days of the release of this order, PVBI, FCRI and Berkman shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

18. IT IS FURTHER ORDERED, That Emision, SCI, TBC, Sunstar, PVRC and FCRI shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, as requested in paragraph 9 hereinabove, that DBI shall submit the clarification of its July 27, 1987 amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

20. IT IS FURTHER ORDERED, That, in the event of grant of CBI's application, Michael Balanky and Holly Onosko will be ordered to divest themselves of all interests in and sever all connections with Stations WFYV-FM and WRQL-AM prior to the commencement of program test authority.

21. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Emision, McGowan, PVBI, TBC, DBI, PVRC, Florida, Berkman and Scopinich ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

22. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

23. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

24. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-338

In re Applications:

SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC. (hereafter Southwest Educational)	File No. BPED-870610MF
KENNELWOOD BROADCASTING COMPANY, INC. (hereafter Kennelwood)	File No. BPH-870629MU
RICHARDS COMMUNICATIONS, INC. (hereafter Richards)	File No. BPH-870630MQ
EXCELSIOR COMMUNICATIONS, INC. (hereafter Excelsior)	File No. BPH-870630NA
CHASE COMMUNICATIONS, INC. (hereafter Chase)	File No. BPH-870630NB

For a Construction Permit
for a New FM Station on
Channel 233A in Waco, Texas

HEARING DESIGNATION ORDER

Adopted: July 25, 1989; Released: August 9, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Kennelwood*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Kennelwood has filed such a statement, it is deficient. Kennelwood has not submitted the required certification page (page 2) of Section VI. Accordingly, Kennelwood will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

3. *Richards*. Richards also proposes to hire five or more full-time employees, yet also filed a deficient EEO program. Richards fails to name any Hispanic organizations which will be utilized for recruitment purposes. Our records indicate, however, that 8% of the work force in the community is Hispanic. When a minority group consists of more than 5% of the work force in the community, a representative organization must be named for purposes of recruitment. Accordingly, Richards will be required to file an amended EEO program with the Presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

4. *City - Grade Coverage*. Excelsior and Chase both filed requests for waivers of 47 C.F.R. § 73.315(a). Both applicants state that more than 80% of the community of license will be served within the 3.16 mV/m contour. Engineering analysis confirms that both applicants Excelsior and Chase will cover at least 80% of the area and are thus considered to be in substantial compliance with 47 C.F.R. § 73.315(a). *See John R. Hughes, Inc.*, 50 Fed Reg. 5679 (Feb. 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986, (letter from the Chief, FM Branch, reference 8920 HVT). Therefore, no waiver request is necessary, and both requests for waivers will be dismissed as moot.

5. *Other Matters*. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Southwest Educational	April 28, 1988 (Engineering)
Richards	October 26, 1987 (Engineering)
Chase	March 3, 1988 and October 24, 1988

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Kennelwood and Richards shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

9. IT IS FURTHER ORDERED, That the requests for a waiver of Section 73.315(a) of the Commission's Rules filed by Excelsior and Chase ARE HEREBY DISMISSED AS MOOT.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Southwest Educational, Richards and Chase ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-339

In re Applications of

THOMAS FEREBEE (hereafter "Ferebee") File No. BPH-870925MA

IOSCO COUNTY COMMUNICATIONS, INC. (hereafter "Iosco") File No. BPH-871023ML

For Construction Permit
for a New FM Station
on Channel 239C2
in Oscoda, Michigan

HEARING DESIGNATION ORDER

Adopted: July 25, 1989; Released: August 9, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. In Exhibit I to its application, Iosco reports that its shareholders, Donald Backus ("Backus"), Martin Pennoni ("Pennoni") and Robert Sugden ("Sugden") own an interest in Tawas City Broadcasting Company, licensee of WDBI-FM, Tawas City, Michigan. Iosco has indicated its intent to terminate its relationship with WDBI-FM in the event of grant of the referenced application. Accordingly, in the event of grant of Iosco's application, Backus, Pennoni and Sugden will be required to sever all connections with WDBI-FM prior to the commencement of program test authority.

3. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That, in the event of grant of Iosco's application, Backus, Pennoni and Sugden will be ordered to divest themselves of all interests in and sever all connections with Station WDBI-FM, Tawas City, Michigan, prior to the commencement of program test authority.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-340

In re Applications of

KUET(AM) File No. BP-870330AL
Statewide Broadcasters, Inc.
Black Canyon City, Arizona
Has: 710 kHz, 500W, DA-D, D
Req: 710 kHz, 50 kW-LS, DA-D, D

KVOI(AM) File No. BP-870824AG
Good News Broadcasting, Inc.
South Tucson, Arizona
Has: 690 kHz, 0.25 kW, D
Req: 700 kHz, 1 kW, 0.25 kW-LS, DA-2, U

For Construction Permit

HEARING DESIGNATION ORDER

Adopted: July 25, 1989; Released: August 9, 1989

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Audio Services Division, acting pursuant to delegated authority, has under consideration the above-captioned mutually exclusive applications of Statewide Broadcasters, Inc. ("Statewide") and Good News Broadcasting, Inc. ("Good News") for construction permits. Also before the Commission are three pleadings: a Petition for Forfeiture of License filed by Good News against Statewide; an Opposition to Petition for Forfeiture of License filed by Statewide; and a Reply to the Opposition by Good News. Good News' petition is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in Good News' petition have not been considered and its petition must be dismissed. However, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to 47 C.F.R. § 1.229.

2. *Both Applicants*. The engineering portions of Statewide and Good News' applications are missing the required site photographs. To remedy this deficiency, both applicants must file an appropriate amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *Environmental Impact*. Although information provided by Statewide indicates that its proposal constitutes a major environmental action, its narrative statement failed to include the potential biological effects and hazards of radio frequency (RF) radiation. Under the revised rules, applicants must determine whether their proposal would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.307. If the applications are subject to environmental processing under the § 1.1307 criteria, the applicants must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Since the proposal of Statewide may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, Statewide is required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Statewide will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. The remaining phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

4. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments, however, were filed after the last date for filing minor amendments as of right, March 7, 1988. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Statewide	March 16, 1988
Good News	June 10, 1988; April 10, 1989

5. Except as indicated by the issues specified below, both applicants are qualified to construct and operate as proposed. However, since the proposals are for different communities, we will specify an issue to determine pursuant to § 307(b) of the Communications Act of 1934, as amended, which proposal would best provide a fair, efficient, and equitable distribution of radio service. We will also specify a contingent comparative issue, should such an evaluation of the proposals prove warranted.

6. Accordingly, IT IS ORDERED, That pursuant to § 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with regard to Statewide, in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. § 1.1301-1319.

2. To determine: (a) the areas and populations which would gain or lose primary aural service from the proposals and the availability of other primary service to such areas and populations; and (b) in light thereof and pursuant to § 307(b) of the

Communications Act of 1934, as amended, which proposal would better provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applicants should not be based solely on considerations relating to § 307(b), which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

7. IT IS FURTHER ORDERED, That for the reasons set forth in paragraph 1 hereinabove, the petition filed by Good News against Statewide IS DISMISSED.

8. IT IS FURTHER ORDERED, That in accordance with paragraph 2 hereinabove, Statewide and Good News shall file amendments providing site photographs with the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That in accordance with paragraph 3 hereinabove, Statewide shall submit an amended environmental assessment in compliance with 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, DC 20554.

11. IT IS FURTHER ORDERED, That to avail themselves of an opportunity to be heard and pursuant to 47 C.F.R. § 1.221(c), the applicants shall, within 20 days of the mailing of this Order, in person or by attorney, file with the Commission, in triplicate, written appearances stating an intention to appear on the dates fixed for the hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. § 311(a)(2), as amended, and 47 C.F.R. § 73.3594, the applicants shall give notice of the hearing as therein prescribed, and shall advise the Commission of the publication of such as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 8, 1989

Released: June 9, 1989

George G. Beasley
President
Beasley Broadcast Group
Executive Offices
P.O. Box 1355
Goldsboro, NC 27533

Dear Sir:

This refers to the pending applications for renewal of license of stations WFTC (AM) and WRNS (FM), Kinston, North Carolina (File Nos. BR-880801XJ and BRH-880801C5 respectively). Review of the renewal applications reflect a failure to comply with the Commission's Equal Employment Opportunity Rules.

Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and that it establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit and promote qualified minorities and women and the licensee's on-going assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified minorities and women are not regularly present in the applicant pool.

When the renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, it is granted, if otherwise appropriate. When the application indicates evidence of discrimination or an inadequate record of EEO efforts, the Commission may impose a variety of sanctions, or remedies, such as reporting conditions renewal for less than a full term, forfeiture or a combination thereof. Further, the Commission may designate the renewal application for hearing where the facts so warrant. *See Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO*).

While our review of your renewal applications and response to our letter of inquiry reveals no evidence of discrimination, it does reveal a record of inadequate EEO efforts. From July 1, 1985, through August 1, 1988, the end of the license term, the licensee claims to have followed consistent recruitment procedures in filling 33 vacancies. You state that the stations' vice president and general manager sent vacancy notices to each of 18 "organizations and institutions that have significant contacts within the minority and/or female communities" whenever a vacancy occurred. However, you failed to report how many, if any, referrals were obtained from the 18 organizations contacted.

Blacks constitute 32.5% of the Kinston labor force. Review of the Annual Employment Reports filed since the stations were acquired in 1984 show that of 18 full-time employees in 1985, none were Black. Of 26 full-time employees in 1986, one was Black. Of 24 full-time employees in 1987, two were Black. The 1988 report shows that three of 21 full-time employees were Black, two of which were among the 19 upper-four employees.

Based on the information submitted by licensee, blacks were in the applicant pool for seven of the 33 full-time openings which occurred between July 1, 1985, and August 1, 1988. Of all the recruitment sources listed, only the general publication newspapers are credited with referring four minorities. Your reply states, "the licensee is receiving minority candidates for positions at the radio stations in sufficient numbers." You continue, however, to point out that stronger efforts to attract qualified minorities will be necessary.

Notwithstanding the above pattern of increasing Black employment from 1985-1988, the licensee's overall efforts during this same period were inadequate. Even though there were few Black referrals, you did not modify the EEO program until the renewal application was filed. Thus, it appears that, during the four years you held the licenses for the stations, you failed to adequately analyze, and modify as appropriate, the stations' efforts to recruit, hire, and promote minorities. Hence it appears that the stations repeatedly failed to comply with the Commission's affirmative active provisions set forth in Section 73.2080 (c)(5) of the Rules.

In view of the foregoing, and our review of pertinent case precedent in this area, we conclude that the renewal application for stations WFTC (AM) and WRNS (FM) should be granted for a full term, subject to reporting conditions for three years. In support of this conclusion, we note initially that unlike the record in *Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988), (*Beaumont*), the instant record does not warrant designation for an evidentiary hearing. In *Beaumont*, designation was required, *inter alia*, because the information before the Commission raised substantial questions as to whether the nearly simultaneous departure of five full-time and six part-time Black employees from the station was the result of discrimination. *Id.* at 507-510. Specifically, the licensee's several responses to Commission inquiries on this subject were contradictory and disputed by a petitioner. *Id.* at 504-506. By contrast, there is no evidence to suggest a sudden, simultaneous departure of either minority or female employees in the instant case.

WFTC's record also is less egregious than the records of the licensee in *Kansas City Youth for Christ, Inc.*, 3 FCC Rcd 6866 (1988) (*KYFC*). In *KYFC*, we granted a short-term renewal, reporting conditions and a $10,000 forfeiture upon finding that, although the licensee hired minorities for two of 19 full-time vacancies in an area where minorities constituted 12% of the labor force, the licensee admitted that it did not have an EEO program. Unlike the licensee in *KYFC*, WFTC had an EEO program which you appear to have followed to consistently contact minority and female organizations to recruit applicants as job vacancies occurred. WFTC also hired minorities (three blacks were hired for 33 positions).

Inasmuch as few minority referrals were received, it appears that the EEO program was not successful. Moreover, the record before us suggests that the licensee failed

to analyze the adequacy of its recruitment efforts and assess whether changes were necessary to have an effective EEO program. In particular, the licensee did not know, and therefore did not assess, the extent to which its contacts with 18 minority and female organizations actually produced referrals. Therefore, we find that reporting conditions should be imposed. *See, Michigan-Ohio Renewals (WGVC),* 3 FCC Rcd 6944, 6948 (1988), where reporting conditions were imposed for similar reasons.

With regard to your pending assignment application, we believe that the remedies imposed (*i.e.*, the reporting conditions) should not be altered simply because of the pending assignment. Thus, we see no public interest reason not to impose those measures in a case where they are otherwise appropriate simply because the license is being assigned.

Accordingly, IT IS ORDERED, that the applications of the Beasley Broadcasters, Inc. of Kinston, North Carolina for renewal of licenses IS GRANTED subject to the reporting conditions specified herein.[1]

IT IS FURTHER ORDERED, that the licensee of Stations WFTC (AM) and WRNS (FM) is directed to submit an original and one copy of the following information on August 1, 1990, August 1, 1991 and August 1, 1992:

(a) For the August 1, 1990 report, a list of all job vacancies during the twelve months preceding July 1, 1990, and for the August 1, 1991 and August 1, 1992 reports, a list covering the 12-months preceding July 1, 1991 and July 1, 1992, respectively, indicating the job title and full or part-time status of the position, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired;[2]

(b) a list of employees as of the July 1, 1990 payroll period for the first report and as of the July 1, 1991 and July 1, 1992 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid to the lowest paid), FCC Form 395-B classification, date of hire, sex and race or national origin; and

(c) details concerning the stations' efforts to recruit blacks for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

This action is taken pursuant to delegated authority. *See Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services,* 4 FCC Rcd 1715 (1989), *(Clarification of Broadcast EEO),* modifying Section 0.283 of the Rules.

Should you have questions regarding this action or require further information concerning the employment reports, you may call the Mass Media Bureau's EEO Branch at (202) 632-7069.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTES

[1] In this regard, we are mindful of an assignment of license of the subject stations to Pinnacle Southeast, Inc. and we intend that the reporting conditions should apply to the assignee upon the consummation of the sale.

[2] Such a list might start: (1) D.J., part-time, white female, A.W.R.T.; white male, newspaper; black male, Urban League - selected white female.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 31, 1989 **8940-LY**

Released: August 9, 1989

Weigel Broadcasting Company
141 West Jackson Boulevard
Chicago, Illinois 60604

Gentlemen:

This refers to the application (BPCT-890201KR, as amended May 10, 1989) for modification of the facilities of Station WDJT-TV, Channel 58, Milwaukee, Wisconsin, licensed to Weigel Broadcasting Company ("Weigel"). In this application, you note that Weigel is also the licensee of Station WCIU-TV, Channel 26 in Chicago, Illinois.

You have proposed to reorient WDJT-TV's existing directional antenna by rotating its major lobe of radiation from 320 degrees to 265.5 degrees. True, thereby causing overlap of the Grade B contours of WDJT-TV and WCIU-TV. Since the proposed modification of WDJT-TV would create an overlap of its predicted Grade B contour with that of WCIU-TV, Weigel has requested a waiver of Section 73.3555(a)(3), the Commission's duopoly rule. Section 73.3555(a)(3) generally proscribes common ownership of two television stations whose Grade B contours overlap.

In support of your request, you state that, in 1988, Weigel acquired the construction permit for WDJT-TV after the previous permittee had declared bankruptcy. You assert that Weigel expended in excess of $2.3 million in constructing and placing the station in operation on November 7, 1988. You calculated that WDJT-TV had operating losses of $250,000 in 1988 and you project losses of $1 million in 1989, $778,695 in 1990 and $722,204 in 1991. You also indicate that Weigel will provide additional financial support to WDJT-TV in future years.

You state that WDJT-TV is at a disadvantage being the seventh commercial station and newest of three independent UHF stations in the Milwaukee broadcast market. You assert that, in addition to the competitiveness of this market and the financial instability of the station, WDJT-TV also transmits a weaker signal to southern Wisconsin in relation to the other Milwaukee television stations. You submit that the competing Milwaukee television stations provide at least Grade B service to Kenosha, Wisconsin, while WDJT-TV does not. In support of your allegation, you provide a chart comparing the signal strengths of the other six commercial and two educational Milwaukee television stations with the present and proposed signal strengths of WDJT-TV. With its current facilities, you calculated that WDJT-TV provides a signal in the Kenosha area that is 12.3 to 19.3 db weaker than the other Milwaukee UHF television stations. Your proposed facilities would produce a signal in this area that would be about 10 db stronger than your current facilities. You also allege that the other six commercial television stations provide Grade A service to Racine and WDJT-TV presently does not. As a result of its comparatively inferior signals to these two cities located in southern Wisconsin,[1] you contend that WDJT-TV is technically disadvantaged in effectively competing with the other six Milwaukee commercial television stations for viewers and advertising dollars. You claim that a grant of the proposed modification to the facilities of WDJT-TV and the waiver of Section 73.3555(a)(3) would allow WDJT-TV to provide Grade B service to Kenosha and Grade A service to most of Racine and thereby improve its prospects of becoming a financially viable and competitive broadcast service in the Milwaukee market.

You have submitted an engineering study which shows that the proposed Grade B contour of WDJT-TV encompasses 6,798 square kilometers and 1,746,936 persons; and the Grade B contour of WCIU-TV encompasses 15,053 square kilometers and 7,969,457 persons. The overlap area would encompass 304 square kilometers and 101,139 persons, which is 4.47% of WDJT-TV's Grade B area and 5.8% of its population, and 2.02% of WCIU-TV's Grade B area and 1.26% of its population. Your engineering study also indicates that your proposal will result in an area of 434 square kilometers containing 10,944 persons who will lose WDJT-TV Grade B service. You state that the entire loss area will continue to receive service from five of the other commercial Milwaukee television stations and the two Milwaukee noncommercial educational television stations. In addition, five other commercial television stations from Madison and Green Bay, Wisconsin and two cable systems will continue to serve parts of the loss area.

You maintain that the overlap area is minimal and currently receives Grade B or better service from the other six Milwaukee commercial television stations, and also receives service from nine Chicago-area commercial television stations, excluding WCIU-TV.[2] You further state that stations WDJT-TV and WCIU-TV serve different, large, and highly competitive urban markets, and that they do not compete with one another. WDJT-TV is licensed to Milwaukee, the thirtieth market, and WCIU-TV is licensed to Chicago, the third market. You assert that these stations are programmed separately and distinctly, and you project that they will remain so. Specifically, WDJT-TV transmits primarily syndicated programs and feature films, whereas WCIU-TV broadcasts Spanish and other foreign language and ethnic programming. Thus, you state that no program duplication will occur. Based on the foregoing facts, you conclude that, rather than reducing the diversity of media voices, WDJT-TV will add a new voice and thereby create a net gain in program diversity.

You also claim that the small overlap area and the present diversity of programming in the Milwaukee market preclude the vesting of undue concentration of economic control in Weigel. You state that since Weigel only owns stations WDJT-TV and WCIU-TV, it is not a large group owner of broadcast properties. You note that these stations are not affiliated with any major television network. You assert that no form of combined advertising rates will be employed in connection with the two stations. In addition, you state that the area where the stations' Grade B contours overlap is located in the far southern portion of Eastern Wisconsin, on the fringe of both the Milwaukee and Chicago markets. Therefore, you

contend that no adverse economic or competitive impact will occur as a result of the grant of the proposed waiver of Section 73.3555(a)(3).

The basic principles embodied in Section 73.3555, and the notes thereto, are to promote diversity of ownership in order to maximize the diversification of viewpoints, and to prevent any undue concentration of economic power contrary to the public interest. *See Multiple Ownership Rules*, 22 FCC 2d 306, 311 (1970), *recon. granted in part*, 28 FCC 2d 662 (1971). However, the Commission is not without flexibility to respond to situations where application of a fixed standard would run contrary to other public interest concerns. *See Capital Cities Communications, Inc.*, 59 RR 2d 451, 463 (1985). Thus, before a duopoly waiver can be granted, an applicant must show that the benefits to be achieved by its proposal outweigh any detrimental effects of the signal overlap. *See Press Broadcasting Co.*, 65 RR 2d 845, 847 (1988).

On the basis of the representations before us, we conclude that waiver of the duopoly rule would be consistent with the public interest and precedents. Although the resulting overlap in this case is not *de minimis*,[3] it is not so large as to require a finding that WDJT-TV and WCIU-TV "serve substantially the same area." *See, e.g., WTAR Radio-TV Corp.*, 31 FCC 2d 812, *recon. denied*, FCC 70-1251, released December 7, 1970. Despite the overlap, WDJT-TV and WCIU-TV serve separate and distinct markets, each with individual local service needs. Moreover, there is a multiplicity of diverse signals available to the viewers in the overlap area. Thus, the circumstances here do not indicate that the common ownership of WDJT-TV and WCIU-TV by Weigel will result in any undue concentration of economic power contrary to the public interest. *See Silver King Broadcasting of Vineland, Inc.*, 2 FCC Rcd 324 (1986). We also recognize the loss of WDJT-TV's service that is created by Weigel's proposal but note that the loss area will continue to receive service from ten commercial and two noncommercial television stations and two cable systems.

In view of the foregoing, your request for waiver of the duopoly rule, Section 73.3555(a)(3), to permit common ownership of WDJT-TV, Milwaukee, Wisconsin, and WCIU-TV, Chicago, Illinois, and the application (BPCT-890201KR), ARE GRANTED.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] According to the 1980 Census, Kenosha and Racine have populations of 123,137 and 173,132, respectively.

[2] Fifteen television stations serve the entire Grade B overlap area: WTMJ-TV, Channel 4, WITI-TV, Channel 6, WISN-TV, Channel 12, WCGV-TV, Channel 24, WVTV(TV), Channel 18, and WVCY-TV, Channel 30, all Milwaukee, Wisconsin: WBBM-TV, Channel 2, WMAQ-TV, Channel 5, WLS-TV, Channel 7, WGN-TV, Channel 9, WFLD(TV), Channel 32, WCFC-TV, Channel 38, WSNS-TV, Channel 44, all Chicago, Illinois; WPWR-TV, Channel 50, Gary, Indiana; and WEHS-TV, Channel 60, Aurora, Illinois.

[3] *See Captial Cities Communications, Inc.*, 59 RR 2d 451, 457 n.8 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 2, 1989 **8940-MLB**

Released: August 10, 1989

Community Television of
Southern California
4401 Sunset Boulevard
Los Angeles, CA 90027

Re: Channel 39
Bakersfield, CA
BPET-881012KE

Gentlemen:

This is with respect to your above-captioned application for a new noncommercial educational television station to operate on Channel 39, Bakersfield, California.

On July 16, 1986, the Commission imposed a "freeze" on applications for new television stations within the minimum co-channel separation distances from 30 designated television markets. *Advanced Television Systems*, Mimeo No. 4074 (released July 17, 1987) (hereafter referred to as the "Freeze Order"). The "freeze" was imposed because the high densities of existing television stations in those markets limited the spectrum available for advanced television ("ATV") service there, and the Commission wanted to preserve its spectrum allocation options for ATV use. One of the listed cities is Los Angeles, California. Consequently, all new UHF proposals for communities within 174.5 miles (280.8 km) of Los Angeles are subject to the "freeze". Since Bakersfield is 101.3 miles (163.0 km) from Los Angeles and, therefore, within the "freeze" area, you have requested a waiver.

In support of your waiver request, you state that grant of the waiver would enable you to provide a first over-the-air noncommercial educational television service to Bakersfield. You estimate that approximately 60,000 television households in the Bakersfield area do not even receive the signal of a distant noncommercial educational television station. You further contend that construction of the station would not adversely affect the Commission's ability to use Channel 39 for ATV service in Los Angeles. In this connection, you state that the transmitter site for Station KNSD(TV) (formerly KCST-TV), Channel 39 in San Diego is located only 199.2 km from Mt. Wilson, which is the transmitting site of essentially all the Los Angeles area television stations. You add that all other potential sites for Channel 39 in Los Angeles are even closer to San Diego. You therefore conclude that the use of Channel 39 in Bakersfield would not preclude its possible use in Los Angeles, because the channel is already unusable in Los Angeles due to the proximity of the San Diego station. In any event, you argue that the terrain between your proposed site and the Los Angeles Basin is mountainous and blocks all television signals from one market into the other. Consequently, you conclude that grant of your waiver request is warranted.

We recognize that Bakersfield is one of only a few cities of its size not to have an operational noncommercial educational television station, and we agree that, the "freeze" aside, it would be desirable to have such a station there. We are constrained, however, by the potential need of frequency space for ATV use in the Los Angeles area and, at this time, we do not believe that utilization of Channel 39 in Bakersfield would be consistent with that end.

While supplemental spectrum allotment criteria have not yet been developed in the ATV inquiry, some guidelines can be reasonably assumed from the spectrum availability study results summarized in the Tentative Decision and Further Notice of Inquiry in *Advanced Television Systems*, 3 FCC Rcd 6520 (1988). Specifically, to maintain the option of choosing an ATV system that requires additional spectrum and allows every existing television station to provide ATV service, an ATV system must permit the UHF taboos to be disregarded and more stringent co-channel interference protection criteria to be satisfied. It was suggested that co-channel operation as close as 100 miles from an existing TV station (broadcasting an NTSC signal format) may be necessary. Finally, the ATV spectrum availability studies currently do not include consideration of intervening terrain.

In view of the foregoing, it appears that Station KNSD(TV), Channel 39, San Diego, California, located 120.2 miles (193.4 km) from the Los Angeles reference point and 124.0 miles (199.5 km) from the Mt. Wilson antenna farm, would not prevent Channel 39 from being considered a potentially available ATV channel for Los Angeles. The addition of a Bakersfield station using an allotment that is 101.3 miles (163.0 km) from the Los Angeles reference point and 96.0 miles (154.5 km) from Mt. Wilson, would make Channel 39 significantly less attractive for possible ATV use. At this time, we do not envision consideration of intervening terrain to be a factor in this determination. On balance, we conclude that the impact on ATV spectrum availability in Los Angeles outweighs the public interest benefits of earlier introduction of noncommercial educational television service in Bakersfield. Accordingly, your waiver request IS DENIED, and your application IS RETURNED as unacceptable for filing.

Sincerely,

Alex D. Felker
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Editorial amendment of list of Office of Management and Budget approved information collection requirements contained in in Part 0 of the Commission's Rules

ORDER

Adopted: August 1, 1989; Released: August 10, 1989

1. Section 3507(f) of the Paperwork Reduction Act of 1980, as amended, 44 U.S.C. 3507(f), requires agencies to display a current control number assigned by the Director of the Office of Management and Budget ("OMB") for each agency information collection requirement.

2. Section 0.408 of the Commission's Rules displays the OMB control numbers assigned to the Commission's information collection requirements. OMB control numbers assigned to Commission forms are not listed in this section since those numbers appear on the forms.

3. This Order amends Section 0.408 to remove listings of information collections which the Commission has eliminated or to add listings of new information collections which OMB has approved.

4. Authority for this action is contained in Section 4(i) of the Communications Act of 1934 (47 U.S.C. 154(i)), as amended, and Section 0.231(d) of the Commission's Rules. Since this amendment is editorial in nature, the public notice, procedure, and effective date provisions of 5 U.S.C. 553 do not apply.

5. Accordingly, IT IS ORDERED, THAT Section 0.408 of the rules is AMENDED in accordance with the attached appendix, effective on the date of publication in the Federal Register.

6. Persons having questions on this matter should contact Jerry Cowden at (202) 632-7513.

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Minkel
Managing Director

APPENDIX

Part 0 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 0 - Commission Organization

1. The authority citation for Part 0 continues to read:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. In 47 CFR 0.408, paragraph (b) is amended by removing the following rule section and its corresponding OMB control number:

Rule section no.	OMB control no.
43.31	3060-0058

3. In 47 CFR 0.408, paragraph (b) is amended by adding the following rule sections and their corresponding OMB control numbers:

Rule section no.	OMB control no.	Rule section no.	OMB control no.
2.948	3060-0398	73.3523	3060-0427
15.7	3060-0397	73.3524	3060-0423
15.117(g)(2)-(3)	3060-0398		

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-589

In the Matter of

Amendment of Section 73.202(b), RM-6482
Table of Allotments,
FM Broadcast Stations.
(Taos, New Mexico)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 18, 1989; Released: August 10, 1989

By the Chief, Allocations Branch:

1. At the request of Taos Communications Corp. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 437 (1989), proposing the substitution of Channel 268C2 for Channel 269A at Taos, New Mexico, and the modification of its license for Station KTAO to specify the higher powered channel. Comments in support were filed by the petitioner and by Taos County Radio, permittee of a new station on Channel 260A at Taos.[1] No other comments were received.

2. We believe the public interest would be served by substituting Channel 268C2 for Channel 269A at Taos, New Mexico, since it could enable Station KTAO to expand its coverage area. Channel 268C2 can be allotted to Taos in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.1 kilometers (11.9 miles) south to accommodate petitioner's desired transmitter site.[2] As proposed, we will also modify petitioner's license for Station KTAO to specify operation on the higher powered channel.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 25, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Taos, New Mexico	260A, 268C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Taos Communications Corp. for Station KTAO, Taos, New Mexico, IS MODIFIED to specify operation on Channel 268C2 in lieu of Channel 269A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In its comments, Taos County Radio also requested the substitution of Channel 260C2 for Channel 260A at Taos, and the modification of its construction permit accordingly. Its request has been accepted as a petition for rule making (RM-6677) and will be the subject of a separate Notice of Proposed Rule Making.

[2] The coordinates for this allotment are North Latitude 36-14-48 and West Longitude 105-39-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-346

In the Matter of

Amendment of Section 73.202(b), RM-6742
Table of Allotments,
FM Broadcast Stations.
(Gold Beach, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 20, 1989; Released: August 10, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by St. Marie Communications, Inc. (petitioner), requesting the substitution of Channel 224C1 for Channel 224A at Gold Beach, Oregon, and the modification of its license for Station KGBR(FM) to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 224C1 can be allotted to Gold Beach in compliance with the Commission's minimum distance separation requirements and can be used at the present transmitter site of Station KGBR(FM).[1] As requested, we shall also propose to modify petitioner's license for Station KGBR(FM) to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the channel at Gold Beach or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 224C1 for Channel 224A at Gold Beach, Oregon, since it could enable Station KGBR(FM) to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Gold Beach, Oregon	224A	224C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 2, 1989,** and reply comments on or before **October 17, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lester W. Spillane, Esq.
1040 Main Street
P.O. Box 670
Napa, California 94559
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 42-23-50 and West Longitude 124-21-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-347

In the Matter of

Amendment of Section 73.202(b), RM-6721
Table of Allotments,
FM Broadcast Stations.
(Illinois City, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 20, 1989; Released: August 10, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Martin F. Beckey (petitioner), requesting the allotment of Channel 223A to Illinois City, Illinois, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted.

2. A staff engineering analysis has determined that Channel 223A can be allotted to Illinois City in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules, with a site restriction of 5 kilometers (3.1 miles) southeast to avoid a short-spacing to Station KOEL(FM), Channel 222C, Oelwein, Iowa.[1]

3. In view of the fact that Illinois City could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Illinois City, Illinois	–	223A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 2, 1989,** and reply comments on or before **October 17, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Martin F. Beckey
P. O. Box 269
Muscatine, IA 52761
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-21-49 and West Longitude 90-51-39.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-31

In the Matter of

Amendment of Section 73.202(b), RM-6479
Table of Allotments,
FM Broadcast Stations.
(Comfort, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 20, 1989; Released: August 10, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of Comfort Broadcasting Company, Inc. (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 1631 (1989), proposing the allotment of Channel 236C2 to Comfort, Texas, as that community's first local FM service. Petitioner filed supporting comments reaffirming its intention to apply for the channel.

2. The channel allotment can be made in compliance with the Commission's minimum distance separation requirements with a site restriction.[1] A site restriction of 4.8 kilometers (3.0 miles) west of Comfort is necessary in order to avoid a short spacing to Station KAPT(FM), Channel 234C, Luling, Texas.

3. Since Comfort is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government has been obtained for the allotment.

4. We believe the public interest would be served by the allotment of Channel 236C2 to Comfort, Texas, as that community's first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 25, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Comfort, Texas	236C2

5. The window period for filing applications will open on **September 26, 1989,** and close on **October 26, 1989.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The restricted site coordinates are 29-57-53 and 98-57-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-345

In the Matter of

Amendment of Section 73.202(b), RM-6849
Table of Allotments,
FM Broadcast Stations.
(Barstow, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 18, 1989; Released: August 10, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Hub Broadcasting, Inc. (petitioner), permittee of Station KXXZ(FM), Channel 240A, Barstow, California, seeking the substitution of Channel 240B1 for Channel 240A and modification of its permit accordingly, to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 240B1 can be allotted to Barstow at the petitioner's suggested site 8.3 kilometers northwest[1] of the community, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. However, since Barstow is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain concurrence of that Government in the proposal.

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 240B1 for Channel 240A at Barstow, California. As requested, we also propose to modify the Class A permit of Station KXXZ(FM) to specify operation on Channel 240B1. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 240B1 at Barstow.

4. Accordingly, in order to provide Barstow with its first expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Barstow, California	232A, 240A	232A,240B1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 2, 1989,** and reply comments on or before **October 17, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Ann K. Ford, Esq.
Scott R. Flick, Esq.
Fisher, Wayland, Cooper & Leader
1255 - 23d St., NW, Suite 800
Washington, DC 20037-1125

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Reference coordinates at the petitioner's suggested site for Channel 240B1 at Barstow are 34-58-15 and 117-02-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-348

In the Matter of

Amendment of Section 73.202(b), RM-6717
Table of Allotments,
FM Broadcast Stations.
(Mirando City, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 20, 1989; Released: August 10, 1989

By the Chief, Allocations Branch:

1. At the request of Alderete Communications (petitioner), permittee of Station KZZQ(FM), Channel 265A, Mirando City, Texas, the Commission has before it a petition for rule making seeking the substitution of Channel 263C2 for Channel 265A and modification of its permit to specify operation on the higher powered channel. The proposal could provide the community with its first wide coverage area FM service.

2. Petitioner submitted information in support of its proposal. Petitioner specified its desire to relocate the current transmitter site for Station KZZQ(FM) to a site 21 kilometers southwest of Mirando City. We have confirmed that Channel 263C2 can be allotted to Mirando City consistent with the Commission's minimum separation requirements with a site restriction 21.2 kilometers (13.2 miles) southwest of the city.[1]

3. Since Mirando City is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government is required.

4. As requested, we shall propose to modify the permit of Station KZZQ(FM) to specify operation on the higher class channel, Channel 263C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Mirando City.

5. In view of the fact that Mirando City, Texas, could receive its first wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Mirando City, Texas	265A	263C2

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **October 2, 1989,** and reply comments on or before **October 17, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

James M. Weitzman, Esquire
Kaye, Scholer, Fierman,
Hays & Handler
The McPherson Building
901 Fifteenth Street, N.W., Suite 1100
Washington, D. C. 20005
(Counsel for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The restricted site coordinates are 27-21-35 and 99-11-46.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-124

In the Matter of

Access to Telecommunications Equipment
and Services by the Hearing Impaired
and Other Disabled Persons

ORDER COMPLETING INQUIRY AND PROVIDING FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: July 21, 1989; Released: July 27, 1989

By the Commission:

I. INTRODUCTION AND SUMMARY

1. This proceeding was initiated to gather information concerning the telecommunications needs of the hearing impaired and other disabled persons and to evaluate the need for regulatory measures or legislative initiatives to ensure reasonable access to telecommunications services by those persons.[1] Ensuring reasonable access to telecommunications services by all Americans has been, and continues to be, a high priority of this Commission. In the Notice we observed that Section 710 of the Communications Act, "Telephone Service for the Disabled," suggests that changes in our rules made pursuant to that section require a cost/benefit assessment that shows rule changes would be effective and efficient. Notice at para. 73. *See also* 47 U.S.C. § 710(e):

> In any Rule Making to implement the provisions of this section, the Commission shall specifically consider the costs and benefits to all telephone users, including persons with and without hearing impairments. The Commission shall ensure that regulations adopted to implement this section encourage the use of currently available technology and do not discourage or impair the development of improved technology.

To enable us to make that assessment, the Further Notice of Inquiry (FNOI) portion of the Notice sought comment on important and difficult issues involved in ensuring reasonable access to telephone service for the hearing impaired and other disabled persons, and encouraged existing groups with expertise in the area to coordinate the development of consensus proposals.

2. Although we explored, and subsequently took action on, a number of other matters,[2] of primary concern was whether we should propose rules regarding Telecommunications Devices for the Deaf (TDDs).[3] Several user groups identified an interstate relay system -- which permits TDD users to communicate with users of voice telephones, and vice-versa--[4] as an important service that is not currently available. We noted that although a number of systems were, or soon would be, in operation, they generally provide only intrastate service.

3. To enable us to conduct the cost/benefit analysis Congress requires, we asked parties to submit specific proposals for interstate relay systems. We said proposals should (1) permit access by all, or most, TDDs, whether ASCII[5] or Baudot;[6] (2) propose technical requirements and state how standards would be developed; (3) discuss what roles entities involved in providing service would play, including current private relay system providers; (4) discuss the role of interstate carriers; (5) incorporate an economic assessment of the impact the proposed system would have on ratepayers; (6) discuss any necessary subsidies, show the beneficiaries of the subsidies and the specific benefits; (7) project rates of use; (8) discuss features the system should have; (9) propose regulations applicable to the use and operation of the system, including user eligibility, common carrier responsibilities, administrative and organizational structure, and any limitations. Finally, parties were asked to comment on the Commission's authority to mandate and fund an interstate TDD relay system. Notice at paras. 55-57. To promote the development of consensus plans, we published the mailing addresses of the commenters in the NPRM proceeding and provided nearly four months for the development and filing of comments.

4. Although the formal comments filed in this proceeding generally support the need for an interstate TDD relay system, no specific proposals were submitted. Hundreds of informal submissions from TDD users requested the creation of an interstate TDD relay service. In this proceeding we terminate our inquiry and find that an interstate TDD relay service is necessary to provide reasonable access to telephone service to the hearing and speech impaired.[7] This finding is consistent with the mandate Congress has given this Commission "to make available, so far as possible, to all the people of the United States rapid, efficient, Nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151, and with the authority granted us by Section 710 of the Act. In the absence of detailed proposals for implementing an interstate TDD relay system, we offer for comment two plans designed to accommodate interstate TDD relay service. The first would require interexchange carriers which have more than 0.05 percent of presubscribed lines to separately or jointly provide the service. Under this plan, the carriers would be permitted to recover their costs through charges for other interstate services. The alternative plan calls for the National Exchange Carrier Association (NECA) to assume the responsibility for implementation and operation of the system. Funding for the operation would be covered by an assessment on interexchange carriers, *i.e.*, those meeting the 0.05 percent presubscribed line criterion, based on each carrier's number of presubscribed common lines. In either case, there would be no additional charge for users of the interstate TDD relay service beyond the normal end-to-end toll charges of the serving carrier.

5. The Notice also sought comment on whether we should adopt rules requiring at least 25 percent of public telephones to be equipped with amplifiers, require installation of public TDD paystations and alter public telephone enclosure dimensions. Because of insufficient

information upon which to reach a determination, the record before us does not show the benefits of these recommendations outweigh the costs. Nor do we propose to establish a formal advisory committee as recommended by some. We do, however, encourage formation of an informal group(s) to consider matters of importance to the disabled. Where Commission action is indicated, reports and conclusions developed should be provided to the Commission.

6. In the following sections we discuss more fully (1) our jurisdiction to order an interstate relay system; (2) why one is necessary; (3) two options for how it should be provided; (4) options for recovering its costs; and (5) other issues raised by the Notice.

II. COMMENTS AND DISCUSSION

A. Jurisdiction

7. AT&T[8] argues that TDD relay service is not a common carrier activity. It notes that relay service is available today through a number of institutions, *e.g.*, churches and United Way organizations, and that many states are funding or planning to fund intrastate relay service. Some charitable organizations, it continues, are the providers of the service and some states fund services provided by private suppliers.

8. NCLD-OUT, on the other hand, contends that the Commission has sufficient jurisdiction to mandate and fund an interstate relay service. To support its contention, NCLD-OUT cites Section 1 of the Communications Act of 1934 and notes the Commission's historic goal of providing universal accessibility to affordable telephone service.[9] Consistent with this goal, NCLD-OUT argues, the Commission has an obligation to ensure that telephone service is accessible to disabled persons. An interstate TDD relay service would be a means of satisfying the interstate needs of hearing and speech impaired persons. NCLD-OUT explains that the Commission has "broad authority to 'make such rules and regulations . . . as may be necessary in the execution of its functions.' 47 U.S.C. § 154(i)"[10] NCLD-OUT also claims that the Telecommunications for the Disabled Act of 1982 (Disabled Act), P. L. 97-410, provides the Commission additional authority to mandate an interstate TDD relay service. According to NCLD-OUT, Congress explicitly states that all persons should have access to the best telephone service available and the Commission is required to promulgate rules ensuring hearing impaired persons reasonable access to telephone service.[11]

9. The Ameritech Operating Companies (Ameritech) state that the Modification of Final Judgment (MFJ)[12] prohibits them from providing interexchange telecommunications services or engaging in the production of equipment which could support an interstate TDD relay system. Therefore, they say, they did not submit extensive comments regarding the issues in this phase of the proceeding. Bell Atlantic also contends that its role in an interstate TDD relay service would be limited by the MFJ.

10. The Michigan Public Service Commission staff (MPSC) questions the Commission's authority to order an interexchange carrier to provide an interstate TDD relay service. If the Commission concludes that it does have such authority, MPSC points out that there are a number of questions that must be addressed in order to implement the service. Among them are: Who will be the governing body or bodies (state, federal or jointly)? What should be the scope and operation of an interstate dual party relay system? What will state financial obligations be? The National Association of Regulatory Utility Commissioners (NARUC) also questions the Commission's jurisdiction to establish an interstate relay service. In addition, it contends that many state systems do not offer interstate service because state commissions are unsure they have the authority to order telephone companies to render interstate relay service. Although it offers no specific proposal, NARUC states that the best system would be one that alleviates these problems.

11. For their part, the NYNEX Telephone Companies (NYNEX) believe the Commission possesses the requisite authority. *See Rural Telephone Coalition v. FCC*, *supra*, note 10. NYNEX explains that the Commission was created to ensure that all people of the United States obtain communication services at reasonable rates. However, "[f]unding for such universal service sometimes requires the Commission to find creative means to spread the costs of service across the broadest base possible."[13]

12. The United States Telephone Association (USTA) observes that the Commission has some jurisdiction to deal with the relay questions as they relate to interstate calling. However, it suggests that the Commission limit its involvement to regulating usage-based charges and urging carriers and others voluntarily to enter the TDD relay business. Any action the Commission takes to meet the Communications Act requirement, argues USTA, should not impede the operation of a compensatory, cost-based tariff structure.

13. *Discussion*. Section 1 of the Communications Act of 1934, 47 U.S.C. § 151, directs the Commission to ensure that people of the United States have available "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ." In addition, Section 4(i) of the Act provides the Commission with broad authority to take actions that are necessary to achieve its statutory mandate. Section 4(i) reads: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." The broad mandate of that authority was demonstrated in *Rural Telephone Coalition v. FCC*, *supra*, note 10. In that proceeding, the Commission took action to ensure that Americans living in high cost telephone service areas would not incur unreasonable charges for telephone services. It established the Universal Service Fund to meet that objective. Challenges to the Commission's approach were rejected by the court of appeals for the District of Columbia. The Court noted: "[a]s the Universal Service Fund was proposed in order to further the objective of making communication service available to all Americans at reasonable charges, the proposal was within the Commission's statutory authority." *Rural Telephone Coalition v. FCC* at 1315. Commission action providing for an interstate TDD relay service would be consistent with that decision if it would extend communication service to and from Americans currently denied reasonable access to the telephone network.

14. In addition to general Section 1 authority, the Disabled Act empowers the Commission with specific authority to adopt regulations designed to expand the hearing impaired's access to telephone services. At Section 710(a), the Disabled Act states, "[t]he Commission shall establish

such regulations as are necessary to ensure reasonable access to telephone service by persons with impaired hearing."[14] In its report, the House stated:

> The mandate of the Commission to ensure reasonable access to telephone service is limited to regulations and technical standards that ensure the availability of terminal equipment and transmission service for persons with impaired hearing and that govern the use of such equipment and its interconnection with telephone services for the transmission of voice or data.

House Report No. 97-888, 97th Congress, 2d Sess. at 8 (1982). A hearing impaired person unable to communicate directly by a regular telephone must use a TDD. Through the use of this device, a hearing impaired person can transmit a typed message over the telephone network. If the recipient of the message has a compatible device, communication between the parties can progress in a manner similar to voice telephone conversations. If one party does not own such a device, the conversation must involve a third party -- a relay operator -- to translate messages to a form understandable by the called or calling party. In short, under current technology, the operator must translate typed messages to voice and vice versa, until the conversation is ended. Thus, if, in the Commission's judgment, providing " reasonable access to telephone service . . . that ensure[s] the availability of terminal equipment and transmission service . . . and its interconnection with telephone service for transmission of voice or data . . . " requires a relay service, then Section 710 permits the Commission to order it.

15. The Commission is being asked to take measures which will lead to the inclusion of interstate TDD relay calling to the array of telecommunications services available to the public. A TDD relay call does not differ significantly from a normal voice call except for the interposition of a relay operator to facilitate call routing for persons with impaired hearing or speech. Given the Commission's broad discretion under Sections 1 and 4(i) of the Act, and the intent and language of the Disabled Act, we believe the Commission has the authority necessary to require implementation of an interstate relay service in order to ensure that the hearing impaired are not denied reasonable access to the interstate telephone network.

16. As an alternative to our primary proposal to proceed on the basis of Sections 1, 4(i), and 710(a), we seek comment on the relative advantages or disadvantages of basing our actions in this proceeding on our authority under Title II of the Act. We note that in amending the Act "to ensure reasonable access to telephone service by persons with impaired hearing," 47 U.S.C. § 710(a), it is unlikely that Congress intended to deprive this Commission of jurisdiction and authority granted to it under other Sections of the Act. We tentatively conclude that our Title II authority, particularly that authority granted under Sections 201(a) and 214(d), provides an adequate statutory foundation for the proposal presented in this Notice, either separately or in combination with Sections 1 and 710.

B. TDD System

17. Having decided we have jurisdiction to order the creation of an interstate TDD relay system, the question is raised whether we should exercise that jurisdiction. Cincinnati Bell's comments advocate no Commission action toward implementation of an interstate relay system. It relates there are two volunteer relay systems operating in its service area currently providing intrastate and interstate services. It also notes there are commercial relay services available. Therefore, it feels the demand for relay services is being adequately satisfied. Further, with the rapid advances in technology "the Commission 'should consider channeling its expertise to encourage market development of technology for relay centers rather than creating a new relay system independently,'" Cincinnati Bell Comments at p. 5.

18. NCLD-OUT rejects Cincinnati Bell's recommendation that the Commission focus solely on the development of new technology rather than addressing existing needs for interstate relay service. It also disapproves of the idea of the Commission waiting until automated relay centers are available before requiring the provision of relay service. Such centers will not be feasible in the near future and there is a communications need warranting satisfaction immediately, NCLD-OUT argues.

19. Regarding future technological developments likely to improve TDD users' access to telephone services, AT&T sees no major breakthroughs on the immediate horizon. It believes changes will evolve over time and as a step in that direction it anticipates the introduction of AMA-type billing[15] and Automatic Number Identification soon. These enhancements, in its view, will reduce the operators' involvement in the call process. It also anticipates the colocation of relay centers with its future Operator Service Position System. This arrangement permits the coordination of voice, data and call control signalling via ISDN technology and provides some language selectivity which would be unavailable at independent small centers. Additionally, this arrangement permits relay service to be provided from a smaller number of locations. The technology of text to synthesized speech and automatic speech recognition techniques has not advanced sufficiently to expect their use in the near future. On this issue, NCLD-OUT's comments parallel those of AT&T, except that it appears that NCLD-OUT is more optimistic about the pace with which the synthesized voice and automatic speech recognition systems will appear. In addition, it encourages the Commission to facilitate the development of the technology for these systems by including an assessment in the charges imposed on interstate carriers to fund the necessary research. BellSouth points out that current manual systems ultimately will be replaced by computer controlled systems.

20. Citing some of the developing technology under study, NYNEX notes that the Commission's long-term goal should be an automated relay system. NYNEX envisions that successful deployment of technology capable of converting speech to text and vice versa eliminates the need for operator assisted relay calls. Such a system would lead to reduced cost and improved efficiency, as well as reduce the subsidy required to provide interstate relay service, it claims. In addition, system users would be afforded greater privacy, and the technology could be effectively integrated into a manual system. NYNEX does not, however, suggest when such a system might be available. SWBT also discusses the application of

voice recognition and translation technologies in a relay system, but indicates development of these technologies have not advanced to the point that they can be beneficially employed in today's systems.

21. Pacific sees future computer technology increasing the deaf community's access to telecommunications services and its privacy, while reducing the costs of current services. Therefore, it suggests that any implemented interstate system must be adaptable to future computer technology.

22. After describing the range of quality of service experienced with different relay services, Dr. Menzel urges that the Commission's Rule Making is needed chiefly "to establish standards for intrastate relay systems to assure mutual compatibility among [existing systems] and remove barriers to relay calls across state boundaries." Dr. Menzel Comments at p. 12. Indeed, he notes, if the Rule Making brings about compatible intrastate systems, an interstate system will have been effectively established without directly creating one.

23. BellSouth, noting that several states have implemented TDD programs and state relay systems, explains that the states are in the best position to assess local conditions and devise a strategy which most effectively address the needs of the hearing impaired within their boundaries. Because the majority of TDD uses is local in nature, BellSouth feels development of state systems is important. However, it recognizes that these TDD users must also have interstate calling ability and suggests that the Commission provide the necessary policy guidance to satisfy this need. To achieve the greatest efficiency, BellSouth recommends that the interstate system be integrated with all intrastate systems.

24. While supporting the idea of interstate relay service, NYNEX advocates provision of the service through the use of existing state relay systems. By employing this arrangement, NYNEX contends that carriers operating existing systems would be compensated for handling all interstate calls, including those just transversing their systems.

25. As have others, Southwestern Bell Telephone Company (SWBT) also urges the Commission not to disrupt or supplant the existing state and private relay systems. It believes these systems could assist in lowering the cost of an interstate relay system and provide diversified approaches to the problems arising from the introduction of interstate relay service.

26. While pointing out that currently there are no regulatory impediments to the provision of interstate TDD relay service, US West notes that most intrastate systems do not offer interstate service. In its view, a single center providing both interstate and intrastate services would be the most efficient. But, according to US West, legislative changes would be required in many states. US West seems to suggest that because most intrastate relay centers are operated by independent vendors or non-profit groups, an interstate center should be operated by a third party. By this arrangement, users could select any carrier and favorable terms and prices could be negotiated in a competitive market.

27. Bay Area Center for Law and the Deaf, Inc. and the Deaf Counseling, Advocacy and Referral Agency, Inc. (Bay Area Center) calls for immediate provision of interstate service through existing intrastate relay systems. It sees no technological impediment to such offering and believes existing state subsidy schemes should support interstate calls to and from states with existing systems.

28. After expressing a concern that interstate relay service not adversely affect its members in terms of costs and cost recovery, USTA asserts that it prefers to rely on the marketplace to deliver the service voluntarily. Although supportive of the view that the hearing impaired are entitled to make use of LECs' networks, it believes this access should be aligned with market forces. It notes that public attention now is more focused on the needs of the hearing impaired and the best way to meet those needs are unclear. Thus, it urges the Commission to avoid interruption of normal market forces.

29. AT&T feels the Commission should allow the states to establish TDD relay systems before imposing some untried initiative on the industry. Its view is that states are only recently moving to address this problem, calling patterns for this service are predominantly local, states are more directly interested in service to the deaf community, a federally mandated system would be limited to interstate calls, and a federal system without an intrastates program could lead to user dissatisfaction due to an inability to access the total universe of telephone users. Moreover, many states have created agencies to oversee relay programs while no comparable federal agency has been established. In AT&T's opinion, only the lack of sufficient funds impedes states' commitment to the deaf community. It feels the Commission could assist in bringing about a universal service by seeking legislative support for federal funding to states for this purpose.

30. In its reply comments, AT&T notes the support for the idea that state systems be allowed to evolve into an interstate system. Under this scenario, AT&T suggests that some states' centers could serve as regional centers for other states thereby providing the necessary coordination for an interstate system and adding the incentive to employ the most advanced technological and economical facilities. Because state systems would be or are under contract, innovative procedures and facilities could be more rapidly deployed than the regulatory process would permit. It takes exception to the notion that states cannot require their systems to provide interstate service. This misconception, it believes, stems from the belief that relay service is a common carrier activity. AT&T maintains that the provider of relay service renders neither interstate or intrastate telecommunications service. Therefore, this vendor is not subject to common carrier regulations. AT&T explains that if state legislatures provide funding for relay service, there is no doubt that they can authorize subsidies for interstate service as well. If this should occur, AT&T notes, the cost may be allocated between interstate and intrastate services and presumably recognized for rate purposes by both the FCC and state PSCs. The reason states have not taken this step, AT&T suggests, stems from the fear that service would be abused by nonresidents of the states.

31. Rochester Telephone Company (RTC) believes the optimal arrangement for the provision of interstate relay is only one system. In its opinion, that operator, whether an IXC, LEC or some non-carrier entity, should be required to provide estimated and actual cost data regarding the operation of the system and should be limited to a reasonable investment return. However, it should not be

permitted to earn monopolistic return for, RTC reasons, the system operator is likely to receive some form of subsidy and encounter little if any competition.

32. Notwithstanding the many comments supporting use of state relay systems to provide interstate service, the Telecommunications Access for Communicatively Impaired Persons (TACIP) favors a distinct interstate system. Pointing to its own state system (Minnesota), TACIP claims that interstate service provided through that system will not be on par with its intrastate service. Interstate calls originating in Minnesota will be routed to the callers' operator of choice, resulting in a higher toll charge than those that could be dialed directly. Calls from out of state incur a toll charge to the relay center and possibly a charge to the calls' Minnesota destinations. A national relay system avoids such disparities and should remain distinct from intrastate, both in organization and funding, asserts TACIP.

33. NCLD-OUT suggests that the most efficient method of operating a relay service requires employment of regional relay centers, designed to take advantage of economies of scale while minimizing distance-sensitive costs. To determine the appropriate locations for these centers, NCLD-OUT states data regarding call volume, population and population distribution of the hearing and speech impaired, personnel costs, equipment costs, etc. must be obtained. Such data also should assist in determining the number and types of communications lines needed to render the service. While NCLD-OUT believes the Commission is empowered to require that all interstate carriers offer relay service, it feels that a more effective and efficient service would be provided through a unified system. GTE, on the other hand, contends that the optimal solution is to establish a national network through interconnected systems which takes advantage of existing operator work forces. By using experienced operators, the cost of adding TDD relay service capability may be incremental, GTE states.

34. In commenting on the configuration of an interstate TDD relay service, NCLD-OUT encourages coordination of efforts among the parties responsible for both the interstate and intrastate relay services. The New York Department of Public Service (NYDPS) suggests that the interstate relay system mirror the interstate network serving the non-impaired population. To obtain more details on a system design, NYDPS further suggests that the Commission request system models and cost analyses from interstate carriers and other parties interested in operating a system.

35. NARUC argues that an effective relay system should be integrated in order that inter- and intra-state services are offered and administered at the state level. Besides offering more effective administration, NARUC believes that working from the state level enables users to make the necessary local and intrastate calls. At the same time, providing service from the state level enables users to choose among interstate carriers, it avers. If only one carrier is permitted to provide the interstate service, NARUC charges that TDD relay service users would be denied carrier choice. Should the Commission decide to rely on state systems, NARUC urges that federal support be appropriated. Under such a scenario, NARUC believes that a Federal-State Joint Board is warranted to recommend minimum standards of service and guidelines. This arrangement, it urges, is the most direct route to realizing a national relay system.

36. Due to legal constraints that limit its participation in interLATA services, Pacific states it will not submit a specific proposal for an interstate relay system. But because it participates in the California Relay System (CRS), it offers several issues for consideration in this proceeding. Among them is what it terms interconnectivity, *i.e.*, an integrated interstate/intrastate system and the proper allocation of resources between systems. Another issue it sees as key in determining TDD relay system design and funding is an accurate projection of system usage. While it suggests that existing TDD calling patterns be reviewed, it notes that enhanced interstate calling capability dramatically alters calling patterns.

37. No party submitted a detailed system configuration for review. AT&T notes that it has estimates of the deaf population and its distribution by states which it used to model a national system but deems the information to be proprietary. AT&T does provide some cost estimates for various center sizes, however. For example, it projects that start-up costs for a small office to be $150,000 and $1.5 million for a large one. The annual operating costs for these centers would range from $2.5 million (small) to $15 million (large).[16] No itemized details were disclosed.

38. Although the Public Utilities Commission of the State of California (CPUC) did not offer any specific proposals for an interstate relay system, it did share some of its observations of the CRS. First, it notes that the CRS has proven to be a useful tool for the hearing and speech impaired. The demand for this service, it relates, far exceeded expectations. Original projections called for a traffic volume of 50,000 calls per month. However, at the time it filed its comments, the volume had exceeded 200,000 per month. CPUC explains that the CRS is limited to intrastate calls because the service is funded by California telephone ratepayers. It believes that any expenses incurred by its participation in an interstate relay system should be recovered by some interstate or federal subsidy. Nevertheless, it notes that investigations are underway to determine the feasibility of the CRS handling interstate calls.

39. In describing the Minnesota relay system, TACIP provides data regarding the expected number of calls initially and five years hence. Initially, it expects the call volume to be 25,000 calls per month. (That is based on a deaf population of 49,700 persons.) Of these calls, TACIP estimates that 80 percent will be TDD originated and 20 percent originated by voice callers. It believes 95 percent of calls will be local in nature; four percent intrastate toll and one percent interstate. After five years of operation the call volume anticipated is 55,300 calls per month. TACIP points out that the Minnesota system provides access to interstate service through use of operator assisted services, but the call volume is low and will not support billing mechanisms. An interstate system would alleviate this dilemma.

40. *Discussion.* Nearly all commenters agree that adequate interstate TDD relay services are not currently available. Cincinnati Bell's comments to the effect that adequate services are available are unsupported and are contrary to the experience of the other commenters.

41. It does not appear that technological breakthroughs that will ameliorate the need for an interstate TDD relay service are imminent. While the commenters have provided a full assessment of automatic speech recognition, voice synthesis and similar technologies, no commenter projects near term implementation of these technologies.

At some point technology may evolve to the point where any necessary translation services can be performed automatically, perhaps through customer owned terminal equipment. But at this time it appears interstate relay services will need to be performed in a manner similar to current intrastate relay services. Near term technological advances are likely to be limited to simplified billing and control signalling. Other options are noted by the commenters. These include encouraging evolution of existing state systems, government funding of a separate corporation, and relying on private service providers. All have certain advantages, as is noted by their proponents. But there is no basis in the record, or events to date, for believing that any of these approaches will soon result in a viable interstate TDD relay service. While we sought consensus proposals in the Notice, none has been forthcoming. Accordingly, we find that reasonable access to interstate services for TDD users will not occur unless we order that the service be provided. In addition to ensuring earlier accessibility to interstate service, an interstate relay system could serve as a model for future systems and could provide the impetus for coordination and standardization for all systems.

42. We may not mandate a system, however, without weighing the benefits against costs. An interstate relay service is needed to enable hearing and speech impaired persons to become full participants in this society. It would provide individuals, businesses, and institutions without TDDs an effective communication link to the TDD using hearing and speech impaired community. The service would remove barriers to employment for these individuals while concurrently providing them access to governmental services and the ability to transact interstate business. It would provide them with greater opportunities to travel and to gain independence. Without the service many hearing and speech impaired individuals are underutilized. This loss of productivity becomes a needless burden for society as a whole in that an interstate TDD relay service would remove impediments precluding these persons from becoming productive citizens.

43. Congress has enacted legislation ordering creation of a Federal relay system[17] so that TDD users within and without the Federal government can access all Federal agencies. Many states are planning or have implemented relay systems for intrastate calling. These actions are likely to increase the demand for a public interstate TDD relay service, which currently does not exist. Indeed, the benefits resulting from such access are no different from the social, economic and other benefits enjoyed by those who today have reasonable access to interstate telephone service. Benefits are not limited to the disabled but innure to all who will be able to communicate with TDD users.

44. As part of a cost/benefit analysis we need to determine the number of users and the costs of providing a system. There are approximately 2 million deaf Americans[18] who potentially could benefit from an interstate TDD relay system. But we cannot assume all are interested in, or capable of, doing so. We believe the most reliable way of proceeding is to analyze the experience of operating state relay systems and to extrapolate the data to a nationwide system.[19] Assuming the California TDD user population is representative of the nation as a whole, we assume there are 181,200 TDD users in the United States (226,500,000 United States population X 0.08 percent, the ratio of TDD users in California) who are willing but currently unable to communicate with Americans in other states. While the costs of providing an interstate relay system for this population are substantial, and vary depending upon the system design, they are not prohibitive.

45. Also assuming that all TDD users' calling habits parallel those of Californians, the national monthly calling volume would be approximately 1,993,200 intrastate calls per month (181,200 TDD users X 11 TDD relay calls per month). To derive the volume of interstate TDD relay calls we will use data prepared by the staff of the Federal-State Joint Board in CC Docket No. 80-286, entitled Monitoring Report, CC Docket No. 87-339, December 1988. From Table 4.27 of this document, we estimate that the interstate component of all telephone calls is approximately 12 percent. Applying this interstate calling rate to TDD users, the total number of interstate TDD relay calls would be approximately 271,800 per month (X total TDD calls per month - 0.12X interstate TDD calls per month = 1,993,200 intrastate calls per month = 0.88X = 1,993,200; X = 1,993,200/0.88 = 2,265,000 total TDD calls per month; 0.12(2,265,000) = 271,800 interstate TDD relay calls month.)

46. From the record, a small relay center can handle at least 35,000 calls per month, while a large one is capable of processing in excess of 200,000 calls per month. To provide interstate TDD relay service, it seems only one large center may be necessary. (The CRS center, which is classified as a large unit, reportedly now processes 250,000 calls per month.) The estimated cost to establish such a center would be $1.5 million, and it would require $15 million annually to operate.[20] Even if two centers were necessary to provide adequate access to relay service, the three year cost would be approximately $93 million.[21]

47. In the *Third Report and Order* in CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983) (Third Report and Order), the Commission determined it was in the public interest to create a Universal Service Fund to ensure that universal telephone service is preserved. This fund is supported by interexchange carriers and is used to defray part of the high cost of providing local loops experienced by some telephone companies. In the Cap Rock Telephone Company study area (No. 442046), for example, the average annual cost of providing a local loop is $506.28.[22] The cost of providing interstate TDD relay service to a TDD user is $83.00 per year with one center in operation, or $166 per year with two centers. Therefore, the cost of providing interstate TDD relay service is within the range of the cost of providing telephone service in high cost areas. It is not inappropriate, then, that we rely on the Universal Service Fund to assure access to telephone service by the hearing and speech impaired. We believe that the cost of increasing the Universal Service Fund charge by 6 percent[23] is outweighed by the benefits of bringing access to interstate services to and from Americans who use TDDs. We conclude that the benefits of an interstate relay system outweigh the costs.

48. *Service characteristics.* Having determined we can and should require an interstate TDD relay system, the matters of how it should be designed, organized and funded must be addressed. In its comments, AT&T outlines what it sees as essential characteristics for a successful TDD relay service. First, it notes, the Commission must find an entity to manage and administer the program, *i.e.*, collect and manage funds, contract with a service provider(s), and review service supplier performance. Moreover, AT&T offers, service should include the ability to handle TDD-to-voice and voice-to-TDD calls

as well as calls generated by Baudot or ASCII formatted terminals. In addition, it suggests, relay center operators or transliterators should (1) be able to interpret typewritten American Sign Language and transliterate it to spoken English, and vice versa; (2) possess typing, spelling and vocabulary skills; and (3) adhere to a strict standard of confidentially. The centers should handle virtually all classes of calls provided by carriers, *e.g.*, non-coin sent-paid,[24] third party number, calling card and collect calls. AT&T points out that some systems currently exclude calls such as coin sent-paid, because of the difficulty in collecting coins, and calls to recorded messages, due to operators' inability to transcribe accurately these rapidly transmitted messages.

49. GTE raises a number of questions regarding the classification of calls involved in a relay service. For example, it asks:

> [I]f a call is made to a TDD Relay in State A from a location in State A and then extended to State B, is the relay operator providing a local, intrastate, interexchange or interexchange access service? Depending on the classification, different entities may be eligible to participate in the service.

GTE Comments at p.8. In addition, it indicates that some carriers may be precluded from providing this service, but it suggests that the nature of the service be interpreted in a manner allowing the greatest number of participants. Ameritech feels an interstate TDD system should not duplicate existing intrastate systems. It believes enhancing intrastate systems to provide interstate service should be the Commission's goal.

50. In addition to those standards already identified by others, Bay Area Center proposes that the interstate relay system be designed to permit TDD users (hearing-impaired users) to use voice transmission, or to receive voice transmission (speech impaired users).[25] It states that many deaf adults became so late in life but are able to speak. A system designed to handle this one way voice conversation would improve cost efficiency by reducing call time and improving the quality of the communication, it argues. Bay Area Center advocates a system with the ability to handle recorded voice information. It contends that more and more organizations, both private and governmental, are relying on taped messages to conduct their businesses and the hearing impaired should not be denied access to this information because of the inability of operators to translate the messages properly.

51. According to USTA, the relay issue involves different types of calls which are "caller characteristic dependent." For example, "a call between two hearing- and voice-impaired callers is significantly different than a call between two hearing-impaired callers or between a hearing-impaired caller and a nonimpaired caller." USTA Comments at p. 8. Therefore, the equipment required and the duration of the call may be different in each instance, it concludes.

52. AT&T discloses that it is engaged in a study to determine the technical and economic feasibility of relay centers having the capability of one-way voice transmission. It observes, however, that this feature will increase cost and possibly not enhance or speed service as contemplated. According to AT&T, "[t]elephone lines contain two one-way circuits, one to the called party, one to the calling party. It is not feasible to divide these circuits so that one goes directly to the called party; the other to the [relay] center." AT&T Reply at p. 20. AT&T explains though that this may be arranged in one of two ways: the caller may place a call to the called party, who then calls the relay center, which calls the caller. This arrangement requires two calls and may not be possible if one party only has one local exchange line. The second method requires the caller to place a call to the relay center, which patches the call through to the called party. The relay operator would remain on the line to perform any necessary translation. AT&T contends this arrangement only works where the TDD user transmits in the Baudot format or is equipped with more than one local exchange line. In addition to listening to the irritating TDD transmission tones, the operator would also have to manually plug and unplug the relay modem as the transmission changed from voice to TDD on the line serving the TDD user. This process, it maintains, would increase transmission time and maintenance expense.

53. With respect to the issue of an interstate relay service handling recorded messages, AT&T argues that operators must have stenographic skills or access to a recording device which plays back at a slower rate, all of which adds to the cost of the service. In dealing with recordings requiring immediate response, such as inquiries regarding bank accounts, neither solution would address the problem, states AT&T.

54. *Implementation.* To implement an interstate relay service, AT&T states the Commission first must identify a body which will be responsible for managing the program. The Commission lacks the resources to do so itself and, further, lacks the authority to appoint another federal agency to undertake this task, it argues. Moreover, it does not believe carriers should be assigned this responsibility because, even if it is a common carrier service, the Commission would encounter special problems enjoining that responsibility, *e.g.*, deciding how the service would be provided among carriers, and unless subsidized, the carrier's relay service could be loaded with a subsidy while its competitors' non-relay services would not be.

55. NCLD-OUT notes that it does not have sufficient data to present a cost-effective system design. Therefore, it recommends that the Commission organize a Telecommunications Relay System Board (Board) with responsibilities to select an effective and efficient system design, to develop rules and regulations governing the service and to supervise its operation. The Board should consist of representatives of interstate carriers, the Commission, state regulatory bodies, intrastate relay services, and persons from the hearing and speech impaired community. In addition to the Commission creating this Board, NCLD-OUT also would require the Commission to establish parameters within which the Board would perform its responsibilities.

56. Should the Commission decide to contract with a private source to provide this service, SWBT urges that it do so on a competitive basis. Using the competitive approach would result in the most economical service, in its view. Further, it states, any such contract should come up for re-bidding on a regular interval, *e.g.*, every three years, and contain performance standards to ensure that the operator provides high quality service. SWBT also notes that the operator of the relay system does not need to be an interexchange carrier. It envisions a system by which

the communication to and from the relay center could be rendered by a carrier or a number of carriers, or the Commission could allow TDD users to select a carrier.

57. *Discussion.* We agree with AT&T that this Commission has neither the resources nor the expertise to design and operate an interstate TDD relay system. And while an independent board, as suggested by NCLD-OUT, has considerable merit, questions are raised as to our jurisdiction to appoint it. There is no question that interstate carriers have the necessary expertise, organization and management skills to design and manage a system. Our objective is to design a program which encourages flexibility and minimizes public administrative costs and intrusion. We agree with the commenters who urge that any mechanism adopted for the provision of interstate TDD relay service should be consistent with other purposes of the Act. In particular, the method chosen, so far as possible, should not interfere with or influence competition in the provision of other services.

58. One approach to achieving these purposes would be to require the major IXCs to provide interstate TDD relay service, but largely to leave the method by which this would be done to the individual carrier. Carriers might, for example, establish individual systems or cooperate in joint systems, so far as allowable under the antitrust laws. Or IXCs might elect to obtain service by contract from other carriers or organizations. Alternatively, were we to task a separate organization with furnishing an interstate TDD relay service, we would prefer, for efficiency reasons, to rely on one that already exists and has relevant experience. In either case, we expect to establish only general standards for interstate TDD relay service. We offer two approaches to establish a such system. Commenters are asked to consider the merits of both approaches, including the overall implementation and operational costs of each, as well as the cost recovery plan for each.

59. The first proposal would require all major interexchange carriers to be responsible for providing interstate TDD relay service. Under this plan, interexchange carriers that use the switching facilities of local exchange carriers for the provision of interstate or foreign telecommunications services and are subject to Section 69.116(a) of the rules, 47 C.F.R. § 69.116(a), would be required, either individually or collectively, to provide interstate TDD relay service within two years after rules in this proceeding are adopted. The proposed rule would not preclude these interexchange carriers from contracting with an outside party or arranging for one of them to provide the service. The service provided, however, would be available 24 hours per day, seven days a week. In addition, the resultant system(s) would be compatible with TDD equipment using Baudot or ASCII coding. *See* Appendix A, Option I.

60. The second proposal is that the National Exchange Carrier Association (NECA) assume oversight responsibility for the interstate TDD relay system's operation. By Section 69.603(a) of the rules, NECA's activities are limited to the preparation of access charge tariffs or the collection and distribution of access charges revenues, unless further ordered by the Commission. But in the *Fourth Supplemental Notice of Inquiry and Proposed Rule Making*, CC Docket No. 78-72, 90 FCC 2d 135, 151 (1982), the Commission noted that

> The primary function of the association would be administration of the access charge plan. We could foresee the possibility that the association might in the future perform other functions for its members. Expansion of its role, however, would almost certainly require our prescribing rules for allocating costs between administration of access charges and these other activities and our reviewing the arrangements for funding these activities to assure that access service revenues were not used to subsidize these other activities.

NECA currently manages the Universal Service and Lifeline Assistance funds. As manager of the interstate TDD relay system, NECA's responsibilities would entail setting the system design within the limitations discussed above, arranging for a service provider, collecting revenues from interexchange carriers, distributing funds to the system operator and monitoring the system operator's performance. We ask that interested parties discuss the proposal to assign oversight of the establishment and operation of interstate TDD relay service to NECA. *See* Appendix A, Option II.

61. NECA probably would employ only one entity to operate the system. By using one provider, system uniformity and continuity are more likely to result than if more than one operator is hired. At this time, we do not envision a system configuration employing more than two relay centers to meet interstate calling requirements under any scenario. Projections suggest that a single center might handle the estimated 271,800 interstate TDD calls per month. But the California experience indicates that the calling rate increases rapidly as TDD owners become aware of the availability of the service and become more familiar with its operation. It is not clear whether this pattern would prevail for interstate TDD relay calls. From a planning standpoint, it would be prudent to allow for increased calling initially in terms of budgeting and facilities. Thus, the cost estimates for this proposal are $3 million to set up and $30 million per year to operate two centers. (NECA's administrative costs may be added to these estimates.) Funding under this scheme essentially would follow the Universal Service Fund procedures. In commenting on this proposal, commenters also should offer projections of costs to NECA to assume the proposed managerial role.

62. Our second proposal, reliance on NECA for managing the interstate relay system, contains inherent organizational disadvantages. NECA historically has been limited to collecting and disbursing funds. It has not been asked before to serve as a manager of a complex communications network. Such a role would require NECA to establish bidding procedures and standards, specify technical parameters and control costs and expenditures of a subsidiary organization, responsibilities for which NECA has no significant experience. Additionally, Part 69 of the rules, which governs NECA, precludes non-LEC participation on its board. *See* 47 C.F.R. § 69.602. This would prevent others from serving on NECA's board and providing operational guidance. Were NECA's role limited to its current functions of collecting and disbursing funds, the managerial and operational oversight functions would still have to be performed. It is unclear, however, what

organization – if not NECA – would handle them. Interested parties are asked to comment on these issues, and may include alternative plans.

C. User Charges

63. Costs for the system may be recovered from a variety of sources, and a number of parties recommend that costs be recovered from users of the system. AT&T believes deaf/speech impaired users should pay a tariffed rate for the services of interLATA and/or local exchange carriers. It relates that its services are provided to certified TDD users at discounted rates and that local exchange carriers also offer these persons discounted rates. It seems to suggest that all carriers should offer discounts to this group.

64. The FPSC discloses that TDD users in Florida receive toll discounts but there currently is no discount or allowance for third party assistance to complete hearing impaired persons' calls. However, due to increasing correspondence regarding this matter an investigation is underway in Florida to assess the need for financial assistance.

65. NYNEX endorses a sliding rate scale for relay users, based on their ability to pay. To demonstrate their proposal, the companies note that in the state of New York relay users will be charged between 50 and 100 percent of the tariffed rate. The NYDPS recommends that charges for calls be based on origination and termination points without regard to the routing through a relay center(s).

66. SWBT, suggesting the service be provided on a competitive basis, observes that the Commission would be in a position to bargain for discounted rates based on the large volume of traffic anticipated. In view of the extended time required to complete a call, SWBT believes that discounting for impaired customers should be required.

67. US West believes the Commission must first consider whether all users of the interstate relay center would be entitled to toll call discounts, or whether discounts should be offered only to those users in need of financial assistance. US West asserts the Commission must determine how to recover the difference between the real cost of the relay service and the rate paid by end users. The adopted recovery plan, US West maintains, would raise a specter of issues as to who pays, *i.e.*, the general customer body of a specific interexchange carrier or all interexchange carriers.

68. USTA discourages consideration of any rate structure which discounts flat charges designed to recover fixed costs. It observes that network fixed costs (1) are recovered from the subscriber line charge and (2) should be the same whether a call is direct or through a relay, or of a one or six minute duration. "The fact that an impairment may slow communication, then, becomes irrelevant." USTA Comments at p. 8.

69. In its reply, NCLD-OUT urges that charges for interstate relay calls mirror those of comparable non-relay calls. Arguing that relay calls require more time to complete than traditional voice to voice calls, NCLD-OUT also urges that an appropriate discount in interstate toll rates be offered relay users. It disagrees, however, with the NYNEX's suggestion that relay users be billed according to their financial ability. Beyond the administrative difficulties this would create, such a rate structure ignores the principle that relay service should resemble traditional voice telephone service as closely as possible. NYNEX's proposal, in the opinion of NCLD-OUT, "singles out relay service users for special treatment and thus is unacceptable." NCLD-OUT Reply at p. 23.

70. *Discussion*. A number of proposals were submitted advocating different rate schemes for interstate TDD relay service users. Some suggest that the service be offered on a discounted basis, while others believe users should pay according to their financial posture. TDD relay calls consist of two primary elements: (1) communications links between the relay center and the caller and called party and (2) the relay center. If a user of the service were expected to pay the full cost of a relay call, the user would pay for both the call from his location to the relay center and for the call from the relay center to the called party, plus the cost of the relay center's operation associated with that call. We estimate that the relay cost for an interstate call would be about $4.60 ($15 million/12 months/271,800 calls per month -- one center) or $9.20 ($30 million/12 months/271,800 calls per month - - two centers).[26] Requiring relay users to pay such costs would act as a deterrent to use of the service, and would not provide users with reasonable access to telecommunications services. We are proposing that the added cost of providing the interstate relay service be recovered from sources other than relay service users, although we recognize that this assistance will not recover the cost due to the added transmission time required for TDD relay calls. Users would be assessed a charge equal to the tariffed rates of non-relay calls between the same locations of the interexchange carrier providing the communications links for the relay service. Whether this charge should be discounted remains questionable, though at the outset we do not propose to require discounting. With experience, we might revisit the matter of rate discounts for interstate TDD relay calls, but our initial judgment is that the cost/benefit balance is best struck at having TDD users pay the same end-to-end charges as non-TDD users. Parties may wish to propose different cost recovery schemes, but any proposals should be specific and justified.

D. Other charges

71. Because user charges will not recover the additional transmission costs of providing interstate relay service, other sources of recovery must be found. According to AT&T, society bears the responsibility for caring for those who are physically impaired. As society's surrogate, the government should assess its constituency through general taxation mechanisms. AT&T therefore believes that government appropriation is the most equitable way of supporting service to the deaf. *See also* US West Comments at p. 13. As an alternative, AT&T recommends that funding be provided through a surcharge on local exchange lines. However, it finds this method undesirable because it creates additional administrative and accounting tasks, and complicates customer billing. Even with these shortcomings, AT&T notes that some states are using this method to fund their relay services. New York, on the other hand, requires all local exchange carriers to absorb that state's relay service cost in their noncompetitive local exchange services rate bases.

72. To fund an interstate TDD relay service, NCLD-OUT recommends that all interstate carriers pay an assessment into a telecommunications Relay System Fund, based on their number of presubscribed common lines or some other appropriate basis. It notes there are Commis-

sion precedents to support this approach. For example, "the Commission's Lifeline Assistance programs, which are designed to help low-income persons obtain and continue telephone service, are . . . funded through interstate carrier charges." NCLD-OUT Comments at 10. Such programs are paid for through the carrier common line charges. *See* 47 C.F.R. § 69.412. According to NCLD-OUT, using this method to fund interstate relay service is tantamount to treating the cost simply as another cost of providing service. Citing *Rural Telephone Coalition v. F.C.C., supra*, NCLD-OUT argues that because relay service is essential for hearing and speech impaired persons to obtain equal access to the telephone network, "the associated costs should be treated not as special costs incurred for the benefit of only a few individuals, but as necessary costs for providing adequate telephone service to all persons." NCLD-OUT Comments at p. 11.

73. Because it believes TDD relay service is necessary, GTE feels it should be funded by taxpayers. Ameritech concurs with AT&T and GTE on this issue. It contends that local telephone company ratepayers are currently burdened with supporting the intrastate network, and therefore should not be called upon to support an interstate system as well. This is important, they claim, because local exchange carriers are now competing with entities who are able to avoid burdening their customers in a like manner. Bell Atlantic also argues that such a system should be financially supported from general tax revenues, rather than exclusively from the telecommunications industry. It believes an interstate relay system is no different from any other government program designed to address a specific need.

74. Since it believes that the most efficient way to provide TDD relay service is to establish an integrated interstate-intrastate network, BellSouth urges the Commission to consider a funding scheme which also will supplement state funding and those private systems not administered by states. It suggests that this additional funding should be sufficient to cover the costs created by the additional interstate traffic. It recognizes, however, that such a scheme must be coordinated by a Federal-State Joint Board established pursuant to 47 U.S.C. § 410.

75. BellSouth further explains that the Commission has the authority to adopt regulations providing reasonable access to telephone service by the disabled. But there is no clear statutory authority for funding an interstate relay system under Section 710, it claims. Citing *Rural Telephone Coalition v. FCC*, No. 84-1110, (D.C. Cir. 1988), BellSouth contends that such funding may be beyond the scope of the Commission's authority, particularly if it is viewed as a subsidy for the hearing impaired who otherwise would not be able to bear the cost of this specialized service. It further states that funding of an interstate relay system would not be designed to benefit the average subscriber and therefore may be viewed as a public welfare program for the disabled, creation of which would be beyond the Commission's authority. If the Commission decided to raise funds through the interstate rate regulation process, BellSouth notes, that action could be deemed as taxation in violation of the Taxing Clause, U. S. Const. Art. I. § 8. As an alternative, BellSouth suggests that the Commission consider funding the interstate portion of established state relay systems by seeking appropriations from Congress.

76. In discussing its intrastate relay service, California Public Utility Commission (CPUC) states that the California Relay Service (CRS) consumes approximately 60 percent of the Disabled Equipment Acquisition Fund Trust (D.E.A.F. Trust) funds, or about $19 million annually. Revenues for the trust are provided by assessing California telephone ratepayers a monthly surcharge. Through this process, relay service is provided at no additional cost above the normal zone of toll charges. According to CPUC, each CRS call cost approximately $6.00. "Revenue received by the Trust averages $0.50 per calls. This results in a subsidization of approximately $5.50 per CRS call; the majority of CRS calls are TDD originated and are primarily local in nature . . . or receive toll discounts of up to 75% when a toll is charged." CPUC Comments at p. 3.

77. Citing the California trust fund, NYNEX asserts that ratepayers alone cannot support an interstate relay system. It feels that the Commission should ask Congress to include this service in the general tax base or the expenses paid for by Social Security. NYNEX Comments at p. 14. If this proves infeasible, they recommend as an alternative that all interexchange and local exchange carriers share the expense of the service. This scheme, it contends, would not place the burden only on those carriers offering the service. While pointing out that the New York Commission requires its relay service to be financed as a normal operating expense of local exchange carriers (LECs), NYDPS notes that it may be premature for the Commission to discuss funding since there are questions regarding the Commission's authority in this instance and a lack of sufficient system cost information.

78. SWBT opposes any financing plan involving a direct monthly surcharge on LEC local customers or one requiring LECs to absorb the cost of the program in their rate bases as a fully recoverable cost.[27] It relates that LECs are facing competition from a variety of service providers and inflating LECs' cost, even with a worthwhile social cause, increases the incentive for customers to consider alternative service providers. Because of the public benefits to be derived from an interstate relay service, SWBT proposes that the Commission explore the possibility of federal appropriation.

79. According to Pacific, the California system requires significant funding and it therefore opposes any funding scheme for an interstate system which adversely impacts funding for existing intrastate relay systems. The Bay Area Center suggests subsidizing intrastate services and spreading the cost to all U. S. telephone users. TACIP contends that the states are unable to fund interstate TDD relay service and therefore recommends that funds be extracted from either general taxes, interexchange carriers usage or subscriber line charges.

80. According to USTA, any interstate relay system should be compensatory. Thus, it opposes an arrangement whereby the system would be operated by an interexchange carrier, but funded by LECs or by LECs' subscribers. The system operator's rate structure should cover costs, it feels. According to USTA, the problem being addressed is a social one, and if funding is needed society should provide it. Placing that burden on private telephone companies and their customers is tantamount to a tax, which is not a function of the Commission, it argues. If a subsidy is needed, USTA feels that the amount

necessary, including its source and destination, must be known in order to avoid an inbalance between the subsidy and the need for the service.

81. In its reply, AT&T continues to advocate federal funding of interstate TDD relay service through appropriations from tax revenues, opposing the idea that a surcharge be assessed interexchange carriers to support interstate TDD relay service. It notes that some commenters assume that an interexchange carrier would provide the service. These are misconceptions of the funding process, AT&T claims. Interstate TDD relay service is not a common carrier activity, according to AT&T, and therefore does not meet the test of *National Ass'n of Reg. Util. Com'rs v. FCC.*, 533 F.2d 601, 608 (1976). Moreover, those advocating that relay customers be allowed to chose among interexchange carriers (IXCs) also misunderstand the nature of relay service. AT&T argues that the provision of relay service may be rendered by entities other than carriers, such as United Way Organizations. It is not an IXC tariffed service. AT&T asks that the Commission bear in mind the difference between the relay service function performed by a vendor under contract and the communication service a TDD user receives. Because the Commission cannot authorize federal funding, AT&T contends the Commission cannot order IXCs to provide interstate relay service as a common carrier service. To so so would imposes high cost on an IXC for a small volume of traffic (because most calls are intrastate). Also, some IXCs may not choose to provide the service. Further, if all carriers are ordered to provide the service, this would lead to duplication. Finally, the Commission could not fairly require an IXC to subsidize the service while competitors are exempt from the requirement and free of the subsidy burden. According to AT&T, if the Commission requires one IXC to render the service, it must also provide appropriate funding from sources other than the IXC channel revenues.

82. While agreeing with those advocating general tax revenues as a funding source, RTC opposes AT&T's alternative of imposing the funding requirement solely on LECs.[28] RTC argues that "IXCs should not be exempted from the costs of a relay system while the LECs with which they compete are burdened with such costs." RTC Reply at p. 3. It further explains that the competitive nature of IXC markets did not preclude the Commission from requiring IXCs to contribute to the Universal Service and Lifeline Assistance funds based upon their number of presubscribed lines, citing 47 C.F.R. §§ 69.116(a) and 69.117(a). RTC believes that interstate TDD relay service is an extension of the Commission's goal to foster universal service and, therefore, a similar methodology could be employed in this instance.

83. RTC challenges AT&T's assertion that relay service is principally local. It contends that many service providers have limited resources and technical capabilities to provide toll calls; therefore their services are restricted. In light of these conditions, argues RTC, existing calling patterns are not reflective of potential interstate calling habits. Further, RTC discounts the argument that only LECs would benefit from an interstate TDD relay system. In its view, IXCs benefit as well due to the increased traffic stemming from interexchange TDD relay calls. Thus, RTC advocates a funding plan which, if taxes are not available, requires contribution from IXCs, LECs and TDD users.

84. In response to AT&T's statement that the New York relay funding scheme is superior, NYNEX suggests AT&T feels that way because its return on equity in New York is in excess of 20 percent. It notes, however, NYDPS has frozen AT&T's profit margin and cautioned the LECs to find means of lowering cost, including renegotiating with AT&T. NYNEX further claims that AT&T seeks to have the relay funding pay all start up costs as well as subsidize AT&T's emerging OSPS centers. Additionally, they note AT&T's plans to replace manual billing for relay calls with its COMPIS[29] system and to implement other services with applications beyond relay service. In no way should the relay funding subsidize such services, states NYNEX.

85. While noting that most commenters favor using general tax revenues for funding an interstate TDD relay service because of its interstate nature, SWBT rebuts AT&T's argument that an alternative source of funds should come from LECs. SWBT asserts that AT&T ignores the facts that (1) LECs already assist in support of existing systems; (2) the beneficiaries of an interstate system would be the IXCs, not LECs: (3) the traffic handled would be interstate and (4) LECs are facing increased competition in their local exchanges. Therefore, cost of an interstate system should not fall on LECs or their customers. *See also* NYNEX Reply at 5, Ameritech Reply at pp. 2-4, and Pacific Reply at p.2. Ameritech also raises the question of whether the Commission has the authority to impose a surcharge on local exchange service to support an interstate relay service. Although it continues to advocate use of taxes as a funding mechanism, Ameritech suggests the service could be funded in a manner similar to the Universal Service Fund and Lifeline Assistance programs, by a direct charge from NECA to the interstate carriers based on each carrier's number of presubscribed lines. Pacific, on the other hand, supports the process New York State uses, considering cost of relay service as an additional rate base element for interchange carriers.

86. After reflecting on the comments in this proceeding, TACIP now feels a surcharge on all interstate service, including MTS, WATS and private lines, is the appropriate way to fund an interstate relay service. It maintains that "[r]evenues tied to overall long distance usage will provide a funding mechanism that generally reflects usage of the interstate relay service." TACIP Reply at p. 4. Funds from taxes, in its view, would not follow service demand and consequently costs of the service.

87. The State Attorney General of New York urges the Commission to seek definitive relay system proposals from interested telecommunications companies before considering the funding question. However, he notes that the Commission may be influenced by New York State's rate base funding approach.

88. In its reply, NCLD-OUT would have the interstate relay service funded by allocating the cost of the service among LECs and IXCs, while permitting recovery by the carriers through their general rates. Under NCLD-OUT's plan, in those cases where the subject service is provided through LECs' centers, the costs attributable to the interstate jurisdiction would be treated similarly to other interstate costs. Where the service is provided by independent non-carriers calls would continue to be included in access charges, but the LECs would collect and turn over the interstate portion of the access charges to the relay service providers. According to NCLD-OUT, some interstate relay service costs, *e.g.*, research and development, and provid-

ing interstate service to areas without intrastate relay services, may be difficult to recover through this process. However, it recites its earlier idea of a Telecommunications Relay System Fund, to which all IXCs would pay on the basis of their presubscribed lines to cover costs. The Commission's role in this case would be to devise a scheme which effectively allocates the costs of an integrated relay service between interstate and intrastate jurisdictions.

89. Contrary to some commenters' arguments NCLD-OUT maintains that relay service is not a social welfare service warranting public support through taxes. Rather, it is a common carrier service available to all telephone users. "Just as local lines and switching facilities are essential for operation of the telephone network, relay services must be provided if the network is to achieve the goal set forth in the Communications Act of 1934 -- efficient and adequate service for ' *all* persons of the United States.'" NCLD-OUT Reply at p. 14. In NCLD-OUT's opinion, a TDD relay service serves both TDD users and voice telephone users. NCLD-OUT also observes that, contrary to AT&T's characterization, states do recognize relay service as a tariffed common carrier activity, citing N.Y. Admin. Code tit. 16, § 603.2(a); Cal. Pub. Util. Code § 2881; and Ill. Pub. Util. Act § 13.703(b). Even in those states where the service is provided through a governmental entity, the service is part of the telephone network and funded by telephone users, rather than through general taxation. NCLD-OUT Reply n. 14. Frequently, regulatory bodies impose additional costs on industry to ensure adequate service to the public, asserts NCLD-OUT.

90. Imposing additional costs on IXCs will not competitively disadvantage them, NCLD-OUT states. It maintains that the cost of the service is not likely to reach a level necessitating significant rate increases by any carrier. Using information supplied by AT&T and TACIP regarding the service costs and interstate traffic volume, NCLD-OUT contends that interstate relay service costs would not exceed $15 million annually. That amount distributed over all interstate ratepayers is insignificant, it concludes.

91. *Discussion*. We reject the argument that the additional costs imposed by an interstate relay system are not appropriately recovered as are other telecommunications costs. This Commission has been assigned a general statutory mandate to ensure the availability of telephone service and adequate facilities at reasonable charges. *See* 47 U.S.C. § 151. In addition, Congress has specifically directed the Commission to take action to ensure that the hearing impaired have reasonable access to the telephone network. *See* 47 U.S.C. § 710(a). A nationwide, interstate TDD relay system would be a significant step toward achieving those goals, providing a method for hearing impaired persons to send and receive messages using the public telephone network in a manner similar to other users. A relay system is not fundamentally different from other functions performed by interstate carriers to enable customers to communicate with each other. We need not discuss options beyond our expertise and authority such as recovering costs from general taxes.

92. We propose that additional costs caused by interstate relay systems be recovered from rates for other interstate, interexchange services. This approach would seem fairly to assess those costs on the broad base of users of interstate services who will benefit from the increased utility of the overall network. At the same time, each IXC would also have a substantial incentive to pursue methods to provide interstate TDD relay service in as efficient a manner as possible, using the best available technology. Faced with a similar cost recovery problem with respect to telephone service for rural subscribers in high cost service areas, the Commission in the *Third Report and Order* in CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983), established the Universal Service Fund. Its purpose is to ensure that rates charged rural subscribers in high cost service areas not greatly exceed nationwide average levels. We tentatively propose to use the same criteria for the obligation to fund interstate TDD relay service as we currently apply to determine the IXCs who contribute to the Universal Service Fund and Lifeline Assistance programs, *i.e.*, IXCs that are subject to Section 69.116(a) of the rules. *See* Appendix A, Option I.

93. A second option would be to recover the costs of interstate TDD relay service in the same manner as those programs, by adding the costs of interstate TDD relay service to the Universal Service Fund costs, and directing NECA to bill and collect those costs from eligible IXCs. Parties are asked to comment on whether NECA's costs should be limited to operational costs of the center, or should include transmission costs to and from the center. We propose to assign NECA the task of overseeing the distribution of these funds to the entity chosen to build and operate the interstate TDD relay system, subject to normal Commission review and approval. *See* Appendix A, Option II.

E. ASCII/Baudot[30]

94. Referring to the Commission's observation in the Notice that the ASCII format is more widely used among terminal devices, GTE notes that TDD users could expand their base of correspondents using this format. It thus urges the Commission to move toward eliminating use of Baudot equipment. One way to achieve this goal, it suggests, is to require the interstate relay system to be ASCII compatible after some future date.

95. According to Dr. Menzel, TDD format standardization should be left to private organizations currently addressing the issue. He implies that the phasing out of Baudot formatted TDDs should be allowed to occur naturally.

96. In the opinion of USTA, the Commission could benefit the hearing impaired more by encouraging a voluntary format transition for all TDDs from Baudot to ASCII. It believes Baudot machines are becoming more inefficient as other alternatives emerge and development efforts in this area are being curtailed. Although it does not advocate elimination of the Baudot format, it recognizes the major benefits of gradual movement to ASCII devices, e.g., ASCII-formatted TDDs' compatibility with PCs which could make voice synthesis more widely available.

97. According to Cincinnati Bell, the majority of TDD devices use the Baudot format, while many of the modern units are able to handle both Baudot and ASCII. It feels that there is little the Commission can do to end the dual system. Therefore, any interstate relay system created by the Commission, it urges, must be compatible with both.

98. *Discussion*. On the basis of the comments, standardizing the TDD signalling format now is unwarranted. Some commenters point out that many TDD devices use the Baudot format so that requiring all TDDs to use the

ASCII format would impose an unnecessary burden on owners of the Baudot devices. This is particularly so in view of the ability of existing relay centers to accept signals in either format. Moreover, many ASCII machines, with added equipment, can accommodate the Baudot format. The hearing impaired generally must incur additional expenses because of their disabilities. To add another avoidable expense to achieve a degree of standardization that has not been justified would unfairly burden them. The TDD community itself does not advocate an immediate end to the use of the Baudot code.

> Telecommunications for the Deaf, Inc. recommends that all Telecommunications Devices for the Deaf (TDDs) have the characteristics listed below. The key feature of these characteristics is the ability to communicate in both Baudot and ASCII code. This is absolutely essential if telecommunications for the deaf are ever to become part of the mainstream of computer communications.

NCLD-OUT Reply, Attachment at p. 6. The goal of this Commission is to ensure that all persons have reasonable access to communication services. Adopting a standard which would retard achievement of that goal would be inimical to the intent of Congress and this Commission. The interstate TDD systems that develop from this proceeding must accept both formats.

F. Packet switching

99. In the Notice we sought comment on the feasibility of developing packet switched services based on new or existing packet switched networks that could provide low cost connectivity for TDD users. Notice at p. 1988. AT&T concludes that packet switching technology will be of little benefit for TDD users. According to AT&T, this technology is a data service designed to handle major volumes of calls, far in excess of the volumes generated by TDD calls. NCLD-OUT believes packet switching has a role in the provision of relay service. However, other than stating it is likely to reduce cost, NCLD-OUT offers no elucidation. NYNEX, on the other hand, describes a service called Infopath which it claims will permit use of compatible equipment on a circuit switched or packet switched basis. Through the use of a modem, PCs would be capable of communicating with either Baudot and ASCII formatted TDDs. Using either a converted PC or TDD and Infopath, the user will have access to a variety of information services, according to NYNEX.[31]

100. *Discussion*. The record on this matter is insufficient to reach a conclusion. We are confident that new developments in technology will produce useful applications for TDD users and TDD relay services. The interstate TDD relay service contemplated in this proceeding is expected to incorporate existing technology and accommodate future technologies as they unfold. At this time, packet switching for TDD users has not been identified as a technology warranting Commission action.

G. TDDs at Pay stations

101. Because of the high level of vandalism at public telephones and the high cost of TDDs, GTE opposes any regulation requiring permanent placement of TDDs at pay stations. According to GTE, several organizations provide portable TDDs at many airports. In its view, this is the most practical way of providing access to TDDs in public places. BellSouth believes that the cost of providing TDDs at pay stations would outweigh the anticipated benefits due to the high risk of vandalism and cost of maintaining such devices.

102. Pacific also opposes the installation of public TDD pay stations. It relates that at the request of the CPUC it conducted a trial using 37 TDDs to determine how best to provide public TDD stations in California. Vandalism proved to be a major problem and any attempt to reduce it tended to limit accessibility to the TDDs. Thus, with the CPUC's concurrence the trials were discontinued. As an alternative, however, Pacific proposes that the private sector provide TDDs for public use. "Facilities and the TDD equipment can then be arranged . . . to accommodate their preferences as to equipmenmt placement, signage, and the protection of their TDDs. TDDs could be kept at designated locations, checked out for use at [those] locations and then returned for safekeeping." Pacific Comments at p. 9.

103. In addition to the problem of vandalism, Cincinnati Bell notes that it would be too expensive to locate TDDs at public pay stations. It states that the most commonly used TDD model (Baudot and ASCII compatible) costs approximately $500.00 and to equip just a fraction of its pay stations would be enormously expensive. Besides, it continues, the installation of TDDs at pay stations would be an imprudent investment because the majority of the units would lie idle most of the time.

104. Dr. Menzel indicates that the few publicly available TDDs are not used to the extent that might be expected. He reasons that this may be due in part to inoperative TDDs (vandalism) and a lack of knowledge that these units exist. In his view, it would be impractical and not cost-effective to require public TDDs. Rather, he advocates that deaf travelers carry their own portable TDDs to ensure access to telephone service.

105. Although AT&T opposes a regulation requiring incorporation of TDD units into public telephones, it does support TDD connectivity to public pay stations.[32] It believes managers of public facilities should ensure that a reasonable number of public telephones can accommodate portable TDDs, *i.e.*, have available nearby electric outlets to power TDDs, a shelf for placement of TDD units and suitable acoustical TDD connections.

106. TACIP advocates expanding access to telephone service for the hard of hearing by requiring "Pay Phone TDDs"[33] in certain locations, *e.g.*, airports, major shopping malls, hospitals and other public areas frequented by hearing impaired persons. It explains that even if a TDD user travels with a TDD, a majority of public telephones cannot accommodate TDD use because of structure design such as a short cord and the absence of a shelf on which to place the TDD.

107. According to NCLD-OUT, Ultratec, Inc.'s introduction of its "Pay Phone TDD" solves the problem of vandalism highlighted by some of the commenters. The TDD device in this unit is only exposed when in use. In addition, NCLD-OUT believes Pacific's trial fails to show the full potential for public TDD pay stations because it employed unprotected TDD units. It also disagrees with the suggestion that TDD users carry a portable unit for use when traveling. Other telephone users are not required to carry devices to use the telephone and NCLD-OUT argues that the hearing impaired should not be uniquely burdened. Carrying a TDD is cumbersome and

inconvenient, and not necessarily usable at all pay stations due to some stations' design. Therefore, NCLD-OUT asks the Commission to require pay telephones to be compatible for use with TDDs.

108. GTE disagrees with the notion that TDD users should not be required to carry TDDs when travelling. It relates that many business persons routinely carry laptop computers to transact business while in transit, and ambulatory impaired individuals must take their wheelchairs with them. GTE feels disabled persons must share in resolving their communication problems. Where equipment exists which compensates for an individual disability, GTE believes that person should share the responsibility to provide the needed equipment. Of course, GTE notes, if the Commission encourages use of ASCII for TDD use, then a laptop computer equipped with an internal modem could satisfy TDD application as well as other business needs. If ASCII becomes the standard, the need for TDD relay service would be reduced, GTE claims.

109. TACIP responds to the arguments that TDDs should not be incorporated into public telephone because voice users would be confused and that the devices are relatively expensive and are susceptible to vandalism. It claims most hearing persons would not use a phone marked as a TDD payphone. However, should hearing persons attempt to use one they would use it as they would a regular pay phone, at least if the Ultratec model is installed. TACIP concurs that TDDs are more expensive than modifying existing payphones to accommodate TDDs. Finally, it is not convinced that vandalism is so prevalent as to justify not installing TDD pay telephones. Today, it notes, TDDs can be protected by enclosed cases, and they can be located in areas which minimize the potential for vandalism or alarms could be attached for further protection.

110. *Discussion*. The record suggests that there is some need for TDDs while users travel, but there are no data revealing the extent of that need. One commenter points out that an acceptable public TDD costs approximately $500.00. Requiring that public TDD units be installed at public places such as airports, train and bus stations, and other sites where large numbers of hearing impaired people frequent, would result in an enormous cost to telephone ratepayers, who ultimately would bear the cost burden. Absent a strong showing that the costs are outweighed by the likely public benefit, we cannot proceed. Requiring that pay telephones be designed to accommodate portable TDDs, however, should be less costly, and may well provide benefits that outweigh the costs. Parties may wish to propose specific rules that would accomplish this result for consideration as amendments to Part 68 of our rules. Section 68 has provisions relating to the need for coin telephones to be hearing aid compatible, and similar provisions may be appropriate to make public telephones TDD compatible. One possibility, at least for battery operated TDDs, is a standard Subpart F jack for direct TDD interconnection, or a cord length requirement to permit acoustical interconnection. We invite parties having expertise on what modifications to pay telephones may be necessary to ensure TDD compatibility to propose specific rules for analysis.

H. Amplified Handsets[34]

111. In the FNOI the Commission asked for comments on NCLD-OUT's proposal to require 25 percent of public payphones to be equipped with amplified handsets. In response, GTE contends that marketplace forces are addressing the need for amplification in coin and credit card telephones. It relates that GTE telephone companies install amplified telephones where needed. It indicates that the provision of amplified handsets would be costly because these handsets are expensive and highly susceptible to vandalism. This, GTE notes, leads manufacturers to design telephones with amplification circuitry in the body of the units as a form of protection. GTE suggests that universal placement of these telephones could aggravate the very problem sought to be solved. According to GTE, some telephones are located in noisy areas or generate distorted tones. When in use, they amplify this noise. GTE further notes that the American National Standards Institute's guidelines for volume controlled public telephones where there is a bank of telephones is standard industry practice. It feels that the position advocated by NCLD-OUT, if adopted, would be difficult to enforce because many pay telephones are provided as Customer Owned Coin Operated Telephones. Many of these owners are not familiar with the Commission's rules and do not have access to such regulations, it continues.

112. For its part, NCLD-OUT concludes that because many amplifiers are sold the normal telephone sound level is insufficient for many telephone users. Purportedly, the need for amplifiers at public paystations is demonstrated by ongoing efforts by local and state governments to address the problem. NCLD-OUT contends that volume amplification is needed by (1) persons with mild hearing loss not owning a hearing aid; (2) persons with moderate hearing loss owning a hearing aid without a telecoil; (3) persons with severe hearing loss requiring amplification along with a telecoil equipped hearing aid; and (4) persons with no hearing impairments using telephones in noisy locations. Although it is unable to provide precise figures for each group, NCLD-OUT indicates there are more than 22 million Americans suffering some hearing impairment, the majority of whom would benefit from amplified paystations.

113. NCLD-OUT believes the telephone industry exaggerates the cost of amplified handsets. There is one manufacturer that sells such units for $47.00 each it claims. To address the maintenance, repair cost and vandalism problems associated with amplified handsets, NCLD-OUT notes the availability of base-mounted amplifiers for as little as $38.06. According to NCLD-OUT, these units are in use in Connecticut and are being tested in Maryland. In any event, NCLD-OUT contends "[g]iven the large number of people that would benefit from the increased availability of amplified payphones, the cost involved is quite reasonable." NCLD-OUT Comments at p. 20.[35]

114. According to Ameritech, it is general corporate policy to install volume control handsets in public areas having a high concentration of public telephones, *e.g.*, airports, factories, hospitals and regional transit centers. In addition, they note, such handsets are installed upon request. They further disclose that two of the Ameritech Companies have specific policies regarding installation of volume control handsets. One company's policy is to ensure that at least 5 percent of the telephones placed in areas such as those identified above are equipped with a volume control handset. The other company requires that

in health care facilities a coin telephone must have a volume control handset if it is the only one installed on a floor. If there is a bank of telephones, at least 5 percent of them must contain such a handset. Ameritech also relates that it is exploring the use of amplification devices installed on the face of pay telephones. The test results are expected to be positive. Ameritech believes its current policies regarding the use of volume control handsets adequately meet the needs of the regional population that is hearing impaired. According to their estimates, requiring 25 percent of all pay telephones to be equipped with amplified handsets would cost Ameritech's ratepayers $4.3 million. At the same time, there is no guarantee that these telephones will be placed where needed. Therefore, Ameritech opposes NCLD-OUT's recommendation.[36]

115. Bell Atlantic opposes the idea of requiring 25 percent of public telephones to be equipped with amplified handsets. It bases its view on (1) the enormous cost of installing and maintaining such handsets -- the cost to it alone would be $2 million -- and (2) the fact that these handsets amplify both voices on the telephone and background noise and cannot be relied upon as a means of helping the hearing impaired. To address the need for amplification, Bell Atlantic notes that it is currently running a trial of equipment with the amplification circuitry located in the housing of the telephone unit. In addition, it observes that "[t]he Commission should take account of this and other new technology in considering the issue of amplification, rather than limiting its analysis to amplified handsets alone." Bell Atlantic Comments, note 12. Thus, it urges the Commission to refrain from supplementing current business practices with a mandatory rule.[37]

116. NYNEX also opposes regulations regarding amplified handsets. It argues that an amplifier handset's cost ranges between $85.00 and $100.00 per set. At those rates, it estimate that it will cost New England Telephone $1 million and New York Telephone $2 million to comply with NCLD-OUT's proposed regulation. Rather than require that a defined percentage of public telephones be equipped with amplified handsets, NYNEX suggests that, at the discretion of the telephone companies, these types of telephones only be placed in locations most useful to the hearing impaired, *e.g.*, nursing homes, hospitals, and agencies serving the disabled. In addition, they recommend that telephones be marked to alert users which telephones are equipped with a volume control.[38] Because the high costs and maintenance involved outweigh the anticipated benefits of the proposed regulation, NYNEX urges the Commission not to adopt the proposal offered by NCLD-OUT. Should the Commission reason that mandated amplification is essential, NYNEX asks that placement of the amplification circuitry not be limited to the handset, noting that the circuitry can be located in the body of the telephone. Given the availability of technology in this area, NYNEX requests that telephones companies be permitted to use any technology to meet the volume control problem.

117. SWBT also opposes an arbitrary quota of amplified handsets for essentially the same reasons offered by other telephone companies. It explains that 3 percent of its coin operated telephones are currently equipped with amplified handsets. But to meet the proposed quota, it states, would cost $4.86 million. This figure is based on the need to equip 40,500 telephones to meet the proposed standard. According to SWBT, "[e]ach telephone will cost approximately $120 to equip the public coin telephone sets with amplified handsets, based on $55 in hardware expenses and $65 in overall labor costs." SWBT Comments, n. 9.

118. Although supportive of requiring a certain percentage of amplifier-equipped public telephones, US West contends that maintenance costs are so high that they should be considered only in areas of greatest need, such as airports and other areas with high volume of people in transit. It suggests that a target of 5 to 10 percent of public telephones equipped with amplifier handsets might be appropriate.[39]

119. Pacific opposes NCLD-OUT's proposal to require 25 percent of public telephones to be equipped with an amplifier. Such a requirement, it relates, would require it to retrofit approximately 33,416 telephones at a cost of $133.00 per unit or a total of $3,776,000. It believes that its current practice of placing at least one amplifier equipped telephone among a bank of public telephones "in addition to the 100 percent hearing aid compatibility, provide[s] reasonable access by hearing impaired persons to telephone services." Pacific Comments at p. 7. To comply with NCLD-OUT's proposal, Cincinnati Bell contends that it would face a one time cost of $250,259 plus undefined maintenance expenses. Therefore, it is opposed to the imposition of a percentage requirement.

120. According to SNET, the Connecticut legislature has enacted a law requiring that at least 25 percent of that state's public telephones, to the extent possible, be equipped with controllable amplification devices. It expects to meet that goal by the end of 1989, and notes that the structure of the law allows SNET to minimize its conversion costs. Any rule the Commission may adopt should not compromise accomplishments already achieved by the states, it urges.

121. Dr. Menzel believes a person with a properly fitted telecoil equipped hearing aid using a hearing aid compatible telephone requires no additional amplification. Persons using hearing aids not equipped with telecoils typically have mild hearing impairments and generally can hear sufficiently to use a non-HAC telephone unaided. He concludes that NCLD-OUT's proposal is dubious for several additional reasons. First, the environment where these telephones are typically located are noisy, making it more difficult to hear. Second, these handsets are expensive and would benefit few. Third, he notes that some may argue that some severely hearing impaired persons do use hearing aids not equipped with telecoils and thus require amplified handsets.

> However, in such cases the "necessity" is the result of a poor choice of hearing aids rather than of the nature and severity of the hearing impairment. Should the public be expected to pay for costly special devices necessitated by imprudent hearing aid selection? Surely not! [footnote omitted].

Dr. Menzel Comments at p. 4. Because of the unknown size of the population requiring handsets that amplify outgoing voice, and the tendency for these units to transmit background noise, he opposes any regulation requiring installation of such device in public places.

122. In addition to seeking comment on the need for supplemental amplification in public telephones, we also asked for comment on whether it would be more benefi-

cial to require all pay telephones to be equipped with push button pads than requiring amplified handsets. Ameritech favors a push button pad requirement. It notes that at least 79 percent of its pay telephones are equipped with these pads. In most cases where they are not installed, Ameritech notes that the central offices are not equipped to handle the signalling. In those instances where push button service is not available even though the central office is equipped to provide it, Ameritech states that the cost of conversion would be approximately $700,000. They further note that it is difficult to determine which would be more beneficial to the disabled, a requirement that 25 percent of all pay telephones be equipped with amplification capabilities or a requirement that all public telephones be equipped with push buttons. They claim, however, that from a cost perspective the push button requirement would be favored, provided exemptions are made, where, for example, the central office is not equipped for such service and existing paystations are equipped with rotary dial. Bell Atlantic and NYNEX agree. Both oppose mandating height changes and push button installation.

123. *Discussion*. Of the 30 parties participating in this proceeding, 3 support NCLD-OUT's proposal to require 25 percent of public telephones to be equipped with amplifiers. Opposition centers mainly on costs and effectiveness. According to the record, cost of meeting a 25% standard to just those carriers commenting here exceeds $16 million, and no one projects what it would cost the many other owners of pay telephones to meet the proposed standard. Apart from costs, it is unclear how many persons would benefit from such a rule. SHHH indicates that 8 million people would benefit from amplified telephones, but that figure does not disclose the number of individuals who use public telephones. And as Dr. Menzel suggests, the range of beneficiaries may be narrow -- those not having adequate hearing aids.

124. Even if we were to find the benefits of requiring 25% of all pay telephones to be equipped with amplified handsets outweighed the costs, there are concerns of enforceability. Shortly after the adoption of hearing aid compatibility rules in 1983, which required that telephones in certain locations be hearing aid compatible,[40] the hearing impaired community expressed concerns that the rule was not being observed.[41] Congress recognized the enforcement difficulty of a requirement that applied to only certain telephones when it enacted additional legislation in 1988 to require nearly all telephones to be hearing aid compatible. *See* The Hearing Aid Compatibility Act of 1988, P. L. 100-394, Senate Report No. 100-391, 100th Cong., 2d Sess., at p. 3. The number of private owners of public telephones and the limited availability of Commission resources complicate enforcement even further. Furthermore, where there are multiple owners of public telephones at a single location, we have no guidance as to which telephone(s) should be equipped with an amplifier. Nevertheless, the goal sought through NCLD-OUT's proposal would appear to be achieved at least in part by the voluntary efforts of industry.[42] Most of the carriers participating in this proceeding indicate they are installing public telephones equipped with amplifiers in certain locations as a matter of policy and where a need for them is demonstrated. States, too, are free to enact requirements in this area. But on the record before us we must conclude that a rule requiring at least 25 percent or any other fixed portion of public telephones to be equipped with amplifiers is unwarranted.

125. The record is incomplete with respect to the need for a rule requiring all public telephones to be equipped with push button pads. Related questions elicited few comments, most of which opposed adoption of the proposal. Those responding note that a large percentage of their public telephones in areas where the central offices are equipped for tone signalling are already equipped with push button pads. On the basis of these comments and the paucity of data in in the record, we are satisfied that industry is modernizing its facilities to incorporate tone signalling at a rate which is satisfactory to the disabled community. Therefore, further action regarding this matter appears unnecessary at this time.

I. Wheelchair Access

126. On the basis of a report submitted by Gallaudet Research Institute (see Notice, n. 9) chronicling the concerns of the disabled, we asked interested parties to address the need for rule changes to improve access to public telephones by wheelchair users. Ameritech indicates that within their operating territories the percentage of public telephones accessible by wheelchairs range between 63 and 80 percent. In its opinion, these figures demonstrate that it is providing reasonable access even though nearly 10 percent of the public telephones in their areas cannot meet this requirement. That is so because of equipment and enclosures currently in place or owner imposed space limitations. They contend that it would cost $ 2.9 million to convert their remaining convertible stations. Bell Atlantic states that there is no need for the Commission to require public telephones to be lowered because this is already a policy of many telephone companies. It relates that since ANSI determined the optimal height for the coin slot on public telephones should be 54 inches, it has been its practice to conform all of its public telephones to that standard as refurbishing of existing non-standard coin telephone enclosures occurs.[43] As market forces are driving the installation of accessible telephone facilities for the mobile impaired, Bell Atlantic argues no Commission action is required. BellSouth and SWBT agree. BellSouth Comments at p. and SWBT Comments at p. 7. FPSC indicates that as of January 5, 1987, it requires telephone companies to install pay telephone stations in accordance with ANSI A117.1-1986. Moreover, it notes that Florida regulations require AT&T and local exchange carriers to provide free directory assistance to persons unable to use telephone directories. Extension of this requirement to other carriers is currently under review.

127. SNET argues that resolution of this matter be left to the states. In its opinion, adoption of a national standard would jeopardize the flexibility currently practiced in the states.

128. For its part, USTA points out that this matter was previously considered by the Architectural and Transportation Barriers Compliance Board (ATBCB). The record developed reportedly lacked a basis for requiring structural modifications or relocations. Moreover, USTA explains, requiring one adjustment often causes an adverse counter-adjustment. Given there are industry standards to address this matter, USTA feels additional regulation are unnecessary.

129. *Discussion.* No persons or group representing the wheel chair-bound segment of the disabled community responded to our inquiry regarding the need to alter public telephone enclosure designs or telephone coin slot height. On the other hand, various parties from the telephone industry note that suitable standards already exist, that these matters have been addressed by other agencies, and, in any case, that it is industry practice to erect facilities which adequately accommodate the mobile impaired. The record discloses that the ATBCB considered telephone enclosure structural changes but found no need to impose any modifications, and that the telephone industry has adopted ANSI's standard for coin slot height. No further Commission action on this matter appears necessary.

J. Lack of Information

130. It was argued in the Notice that many hearing impaired persons are unaware of regulations that affect them. We therefore requested plans for improving dissemination of pertinent information to the hearing impaired. GTE recommends that the Commission take no further action to require signs indicating availability of hearing aid compatible telephones. It believes the use of the "blue grommet" for noting a HAC coin telephone has been successful and, if the Commission decides to require similar markings for credit card telephones, it suggests that the same symbol be used. GTE states that many of the perceived problems experienced by the disabled can be remedied by education. It states that it is active in efforts to educate the public regarding matters of telephone services and equipment. It suggests that the Commission could play a role in this area too, but it does not provide specific details. BellSouth, on the other hand, believes that the public should be made aware of the services available for the disabled, but it does not believe regulations are necessary. It contends that self-regulation should provide the stimulus for carriers to inform subscribers of available services and relates several actions it is taking to satisfy this need, such as through brochures and bill inserts.

131. US West is agreeable to participating in an information dissemination program regarding hearing aid compatible telephones in public places. It notes such information could be distributed via bill inserts, separate mailings, advertisements or other means selected by LECs. It does not believe, however, that it is the LECs' responsibility to advise employers of the Commission's rules applicable to workplace telephones. That, it argues, should be undertaken by the various hearing impaired associations.

132. According to Dr. Menzel, the best means of disseminating information pertinent to the hearing impaired is through publications of national organizations for the hearing impaired, *e.g.* SHHH, National Association for the Deaf and Telecommunications for the Deaf, Inc. He contends they are more likely to reach the targeted population than any effort by the Commission or any other governmental entity. Thus, Dr. Menzel states that Commission's efforts in this matter should not go beyond assuring that its rules are distributed to all affected organizations.

133. USTA believes continuing education is beneficial to the entire public and encourages greater dissemination of information by interested groups, including the disabled. It states that it will do its part by making available to its members a model bill insert usable for informing subscribers of their responsibilities under the statute and the Commission's rules. It further notes that Commission adoption of a regulation requiring distribution of information would be unenforcible because the Commission's jurisdiction does not reach all members of the public. To improve the distribution of information, USTA offers to join the Commission and other parties to this proceeding to seek alternative means of informing the public.

134. *Discussion.* Several suggestions were offered on improving the dissemination of information regarding telecommunications services and equipment available to the disabled.[44] Some are already employed by various members of the telecommunications industry. For example, directory white pages of some telephone companies contain information of interest to the disabled. While we urge common carriers, particularly local exchange carriers, to publicize information regarding services for the disabled, it seems that the disabled could be more effectively alerted to pertinent regulatory changes through advocacy groups representing them. To this end we ask each organization to cooperate as best it can, but we do not find it necessary to adopt new marking or information distribution regulations.

K. Advisory Committee

135. We earlier concluded that creation of a Commission sponsored advisory committee to address the problems of the disabled was unnecessary. However, because of the different ways relay service can be provided, GTE recommends that the Commission convene a working group of interested parties, using the information gathered in this proceeding, to discuss options. It believes that through such discussion questions such as whether the authorized federal relay system should be integrated with the public system, or whether the service should be provided by a single carrier could be addressed and a consensus solution derived. Ameritech agrees with the Commission's assessment in the FNOI that a FACA[45] advisory committee is unwarranted at this time.[46] They note, however, that they would willing participate in a privately initiated, voluntary committee for gathering and disseminating information designed to aid the disabled.

136. The CPUC suggests that an entity similar to its D.E.A.F. Trust be created to develop and manage the interstate relay service. It recommends that the body consist of representatives from the following groups: the hearing and speech impaired community, local operating companies; interstate carriers, and federal and state regulatory agencies. Under CPUC's scheme, the national trust would be responsible for establishing the relay network structure; setting policies for sharing interstate toll revenue with participating state relay systems, service standards and operating policies, minimum equipment compatibility and policies regarding available services; and determining how the interstate network would be funded and charges to relay users assessed.

137. NYNEX expresses a willingness to serve on an industry task force charged with addressing the funding and implementation of an interstate relay system. It cautions the Commission, however, not to adopt rules regarding relay services before creating an industry task force.

138. SWBT favors creation of a federally sanctioned advisory committee to oversee the implementation of an interstate relay system. It contends that there are many questions to be answered and they best can be addressed

by such a committee. It believes this committee could facilitate the implementation of the service by supplying the Commission with reports and recommendations regarding relay service.

139. US West favors the creation of an advisory committee, and is willing to be a member of such a body. It states, however, that the committee's focus should be broader that the problems of the hearing impaired community. The telecommunications needs of the visually and mobile impaired warrant consideration also and an advisory committee could serve as a forum where a consensus on these needs and resolutions can be reached. Such a committee also could serve as a medium for disclosing information regarding the availability of technology to address specific problems as well as uncovering specific needs of the disabled.[47] Should the Commission establish such a group, US West contends, it should meet the requirements of the Federal Advisory Committee Act, 5 U.S.C.S. Appendix 2, P.L. 92-463.

140. Bay Area Center strongly endorses consumer representation on any committee the Commission establishes to oversee an interstate relay system. This position appears to be predicated upon its perception that consumers' advice is necessary to ensure that the service rendered meets users' needs.

141. Cincinnati Bell urges the Commission to reconsider its preliminary view concerning the creation of an advisory committee. It contends that the importance of such a committee is reflected in state statutes enacting special telecommunications services for the disabled. *See* Minnesota Statute §§ 237.50-237.56 and Florida Statute §§ 427.502-427.504. Cincinnati Bell further suggests that such a committee is needed to create and maintain an interstate relay system.

142. SNET basically argues for creation of an advisory committee to address the issues of implementing an interstate TDD relay system. It indicates matters such as jurisdiction, provisioning, costing, cost recovery, service conditions, technology, market place needs, interexchange and local exchange carrier responsibilities can only be addressed and coordinated with state efforts by such a committee. In fact, it would have the advisory committee plan the implementation of the relay system.

143. Based on its experience with the planned relay center in Minnesota, TACIP strongly urges the Commission to create an advisory body to define and resolve the problems attendant to an interstate relay system. It states that the advisory board in Minnesota was essential for gathering information and believes such a board would be beneficial in this case.

144. AT&T is not supportive of creating an advisory committee to review perceived problems associated with the creation and operation of an interstate relay service. It states that there are many state relay systems in being today and the problems that appear to warrant solutions have all been addressed by these states. To create a committee would only impede the initiation of interstate relay service. AT&T appeals to the Commission not to be misled into believing an advisory committee is needed before interstate relay can proceed.

145. *Discussion.* In the Notice, at p. 1990, we determined that a formal Commission sponsored advisory committee is unnecessary to address the needs of the disabled. Instead, we noted that it is preferable to seek comments i.e., in public forums. However, we expressed no opposition to existing groups forming an informal committee to address issues affecting the disabled access to telecommunications services and equipment. Ideally, meetings of interested parties will result in consensus recommendations that can be implemented privately or, where necessary, forwarded for Commission action. USTA has expressed a willingness to spearhead an informal group to consider concerns of the parties in this proceeding. NCLD-OUT also seems prepared to offer the services of the membership of Telecommunications for Hearing Impaired Consumers -- the THIC Forum -- and host such a committee. Again, we encourage these and other groups to coordinate the development of consensus proposals to address issues regarding the implementation of interstate TDD relay service and to facilitate Commission consideration of telecommunications issues relating to all disabled persons. But no new information has been filed to persuade us to alter our previous determination that a Commission sponsored advisory committee is unnecessary. Our proposals herein will place responsibility for implementing an interstate TDD system in the first instance on the carriers who have provided this country with an effective interstate voice and data network. We propose to provide them considerable flexibility in fulfilling their responsibility, including the use of private representative committees.

III. CONCLUSION

146. We believe the legislative history of Section 710 requires that changes in our rules to provide the hearing impaired with reasonable access to telephone service be made only on the basis of a careful cost/benefit analysis. Our preliminary analysis suggests that 1) the benefits of an interstate TDD relay system outweigh the costs: 2) we have jurisdiction to require such a system; 3) two approaches to implement and provide interstate TDD relay service are available: one would rely on interexchange carriers and the other would rely on NECA to take the system management role; 4) users of the service should pay the same rates that non TDD users do; 5) other costs should be recovered from interexchange carriers' other tariffed charges; and 6) the benefits of other proposals upon which comment was requested do not clearly outweigh the cost. Parties are invited to comment on these proposals, or offer variant proposals they deem appropriate. Support data, financial projections and any other information useful in assessing interested parties' positions are sought.

IV. INITIAL REGULATORY FLEXIBILITY ANALYSIS

147. In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601, the Commission issues the following initial regulatory flexibility analysis:

A. Action Contemplated and Reason for Action.

148. By this FNPRM, the Commission seeks to elicit comment on a proposal to establish an interstate TDD relay service to provide hearing and speech impaired persons with greater access to telecommunications services.

B. Objective.

149. The objective of this proceeding is to further fulfill the Commission's obligation to take action which ensures all Americans have reasonable access to telecommunications services and equipment.

C. Legal Basis.

150. The legal authority for this action is contained in Sections 1, 4(i) and 4(j) of the Communications Act, 47 U.S.C. §§ 151, 154(i) and 154(j).

D. Description, Potential Impact and Number of Small Entities Affected.

151. Because the proposed rules are applicable only to major interexchange carriers, it is not expected that they will have any impact on small entities. The overall economic impact of the proposed rules could be significant for the carrier(s) ultimately rendering the service. The cost of rendering the service ranges between $15 million and $30 million annually.

E. Recording, Record keeping, and Other Compliance Requirements.

152. No additional burdens anticipated.

F. Federal Rules that Overlap, Duplicate or Conflict with these Proposed Rules.

153. None.

G. Any Significant Alternatives to Minimize the Impact of Small Entities.

154. None.

H. Comments are Solicited.

155. We request written comments on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Further Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to this regulatory flexibility analysis. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601, *et. seq.*

V. PAPERWORK REDUCTION ACT

156. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and has been found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase burden hours imposed on the public.

VI. EX PARTE PRESENTATIONS

157. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1), if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy in duplicate of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum in duplicate to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must be clearly labelled "ex parte," state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

VII. ADMINISTRATIVE MATTERS

158. In accordance with the applicable procedures described in Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, interested parties may file comments on or before September 29, 1989, and reply comments on or before October 27, 1989. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information is placed in the public file and provided that the Commission's reliance on such information is noted in the Report and Order.

159. Interested parties shall file an original and 5 copies of all comments, replies, or other documents. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the public who wish to express their interest by participating informally in the Rule Making proceeding may do so by submitting one copy of the comments provided that the docket number is specified in the heading. All filings in this proceeding will be available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C. For general information on how to file comments, parties should contact the FCC Consumer Assistance and Information Division at (202) 632-7200.

160. Accordingly, pursuant to Sections 1, 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and 154(j), and 5 U.S.C. § 553, WE

HEREBY PROVIDE FURTHER NOTICE OF PROPOSED RULE MAKING to amend 47 C.F.R. Part 64 or 69 as indicated above.

161. The Secretary shall cause a copy of this Further Notice of Proposed Rule Making, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a) (1981). The Secretary shall also cause a summary of this Further Notice of Proposed Rule Making to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Option 1 - Rule

It is proposed to amend Part 64 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations, Part 64) as follows:

1. The authority citation for Part 64 continues to read as follows:

Authority: Secs. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201 218, unless otherwise noted.

2. Section 64.605 is proposed to be added to Part 64 to read as follows:

§ 64.605 Interstate TDD relay service.

(a) Each interexchange carrier that uses local exchange switching facilities for the provision of interstate or foreign telecommunications services and that is subject to § 69.116 (a) shall, either individually or collectively with other qualifying interexchange carriers, be responsible for developing and operating an interstate TDD relay system that permits each of its presubscribed customers to communicate with hearing and speech impaired persons who use telecommunications devices for the deaf to communicate with voice telephone users, including equipment operating in both the ASCII and Baudot formats. The systems shall be operational by (ADD DATE) and be accessible 24 hours per day, seven days a week.

(b) The cost of operating the system shall be treated as a normal operating expense to the responsible interexchange carrier and shall be recovered as such.

Option II - Rule

It is proposed to amend Part 69 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations, Part 69) as follows:

1. The authority citation for Part 69 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 69.118 is proposed to be added to Part 69 to read as follows:

§ 69.118 Interstate TDD relay service fund.

Effective (add date):

(a) A charge that is expressed in dollars and cents per line per month shall be assessed beginning on (add date), upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services and that are subject to § 69.116(a).

(b) The charge shall be computed by the association on a semi-annual basis by dividing one-twelfth of the projected annual interstate TDD relay service fund revenue requirement by the total number of common lines presubscribed to interexchange carriers defined in §69.118(a). Beginning on (add date) the association shall bill and collect the charge, and disburse associated revenue, on a monthly basis to the TDD relay service provider.

(c) Telephone companies shall provide the association the data necessary to compute the charge. These data shall include the number of presubscribed common lines in each study area and the number of those lines associated with each interexchange carrier serving that study area. In a study area served by a single interexchange carrier, all common lines shall be considered as presubscribed to that interexchange carrier. Information concerning presubscribed common lines shall be filed with the association on June 30 and December 30 of each year, except for the first such submission, containing presubscribed common line data calculated as of December 31, 19??, which shall be filed on August 1, 19??. Presubscribed common line data filed on June 30 shall be calculated as of December 31 of the preceding year, and presubscribed common line data filed on December 30 shall be calculated as June 30 of the same year.

3. Section 69.603 will be amended by adding paragraph (c) to read as follows:

§ 69.603 Association functions.

(h) The association shall be responsible for insuring the provision of an interstate relay system that permits users of telecommunications devices for the deaf to communicate with voice telephone users. (1)

the relay system should operate 24 hours per day, seven days a week and offer interstate TDD relay service; (2) the relay system must operate in both the ASCII and Baudot formats.

APPENDIX B

COMMENTS

1. American Telephone and Telegraph Company (AT&T)

2. Ameritech Operating Companies (Ameritech)

3. Bay Area Center for Law and the Dear, Inc., and the Deaf Counseling, Advocacy and Referral Agency, Inc. (Bay Area Center)

4. Bell Atlantic Telephone Companies (Bell Atlantic)

5. BellSouth Corporation (BellSouth)

6. Cincinnati Bell Telephone Company (Cincinnati Bell)

7. Florida Public Service Commission (FPSC)

8. GTE Service Corporation and its domestic, affiliated telephone equipment and service companies (GTE)

9. Michigan Public Service Commission Staff (MPSC)

10. Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West)

11. National Association of Regulatory Utility Commissioners (NARUC)

12. National Center for Law and the Deaf, Council of Organizational Representatives, New York League for the Hard of Hearing, Organization for Use of the Telephone, Inc., Maryland Office of People's Counsel, Hearing and Speech Agency of Metropolitan Baltimore, Inc., Maryland Department of Health and Mental Hygiene, Maryland Governor's Commission on Hearing Impairments, Maryland Governor's Office for Handicapped Individuals, Telecommunications Exchange for the Deaf, Inc., Illinois Statewide Task Force for Hearing impaired Persons, and Minnesota Telecommunications Access for Communicatively Impaired Persons (NCLD-OUT)

13. National Center for Law and the Deaf, Organization for Use of the Telephone, Inc., New York League for the Hard of Hearing, Maryland Office of People' Counsel, Hearing and Speech Agency of Metropolitan Baltimore, Inc., Maryland Department of Health and Mental Hygiene, Maryland Governor's Commission on Hearing Impairments, Maryland Governor's Office for Handicapped Individuals, Telecommunications Exchange for the Deaf, Inc., Telecommunications for the Deaf, Inc., and Minnesota Telecommunications Access for Communicatively Impaired Persons (NCLD-OUT)

14. NYNEX Telephone Companies (NYNEX)

15. Otto J. Menzel, Ph.D. (Dr. Menzel)

16. Pacific Bell (Pacific)

17. Plantronics

18. Southern New England Telephone Company (SNET)

19. Southwestern Bell Telephone Company (SWBT)

20. State of California and the Public Utilities Commission of the State of California (CPUC)

21. State of New York Department of Public Service (NYDPS)

22. Telecommunications Access for Communicatively Impaired Persons Board (TACIP)

23. Telecommunications Industry Association, Personal Communications Section

24. Telecommunications Industry Association, User Premises Equipment Division

25. US Sprint

26. United States Telephone Association (USTA)

REPLIES

1. American Telephone and Telegraph Company

2. Ameritech Operating Companies

3. Bell Atlantic Telephone Companies

4. BellSouth Corporation

5. GTE Service Corporation

6. National Center for Law and the Deaf, Council of Organizational Representative (Alexander Graham Bell Association for the Deaf, Inc., American Academy of Otolaryngology-Head and Neck Surgery, American Association of the Deaf-blind, American Deafness and Rehabilitation Association, American Society for Deaf Children, Conference of Educational Administrators Serving the Deaf, Convention of American Instructors of the Deaf, Gallaudet University Alumni Association, National Association of the Deaf, National Fraternal Society of the Deaf, Self Help for Hard of Hearing People, Inc., Telecommunications for the Deaf, Inc., National Technical Institute for the Deaf), New York League for the Hard of Hearing, Organization for Use of the Telephone, Inc., Maryland Office of People' Counsel, Hearing and Speech Agency of Metropolitan Baltimore, Inc., Maryland Department of Health and Mental Hygiene, Maryland Governor's Commission on Hearing Impairments, Maryland Governor's Office for Handicapped Individuals, Telecommunications Exchange for the Deaf,. Inc., Illinois Statewide Task Force for Hearing Impaired Persons, and Gallaudet University

7. National Center for Law and the Deaf, Organization for Use of the Telephone, Inc., New York League for the Hard of Hearing, Maryland Office of People's counsel, Hearing and Speech Agency of Metropolitan Baltimore, Inc., Maryland Department of Health and Mental Hygiene, Maryland governor's Commission on Hearing Impairments, Telecommunications Exchange for the Deaf, Inc., Telecommunications for the Deaf, Inc., National Association of the Deaf, and Gallaudet University

8. New York State Attorney General Robert Abrams

9. NYNEX Telephone Companies

10. Pacific Bell

11. Public Utility Commission of Texas

12. Rochester Telephone Corporation (RTC)

13. Self Help for Hard of Hearing People, Inc. (SHHH)

14. Southwestern Bell Telephone Company

15. Telecommunications Access for Communicatively Impaired Persons Broad

16. United States Department of Justice, Civil Rights Division

17. United States Telephone Association

FOOTNOTES

[1] Notice of Proposed Rule Making and Further Notice of Inquiry, CC Docket No. 87-124, 3 FCC Rcd 1982 (1988) (Notice).

[2] In the Notice of Proposed Rule Making portion of the Notice, we proposed specific changes in our regulations to increase the ability of the hearing impaired to access telephone service by expanding the regulatory definition of "essential" telephones that must be compatible with hearing aids equipped with telecoils. On May 11, 1989, the Commission released a First Report and Order, FCC 89-137, adopting rules which require nearly all telephones manufactured in or imported into this country after August 16, 1989, to be hearing aid compatible. This Second Report and Order and Further Notice of Proposed Rule Making considers the issues not addressed in the First Report and Order.

[3] The term TDD generally refers to a typewriter style device equipped with a message display (screen). This device generates from the keyboard a coded signal corresponding to the typed character. This signal is passed over the telephone network via a voice circuit. Connection to the network generally is implemented through audio coupling to a telephone handset.

[4] Manned relay service enables speech or hearing impaired TDD users to communicate with voice telephone users. The service is accessed by either a TDD or voice telephone user. The caller speaks, or types a call request to, a translator who is equipped with a special video display system. Using this equipment, the translator translates the typed or voice message from one medium to the other, and completes the call to the called party.

[5] ASCII is an eight-level code for data transfer established to achieve compatibility between data devices.

[6] Baudot is a five-bit, 32 character alphanumeric code used in transmission of information.

[7] The Telecommunications Accessibility Enhancement Act of 1988, Public Law 100-542 requires the Commission to complete its Inquiry in this matter by July 27, 1989. By our action today we terminate the Inquiry into whether we should order an interstate relay system for TDD users, as is required by Section 5 of that Act, 40 U.S.C. § 762(c), and proceed to the next step, the issuance of a NPRM, to consider specific rules.

[8] *See* Appendix B for list of commenters.

[9] *See, e.g.*, MTS and WATS Market Structure, CC Docket No. 78-72, 2 FCC Rcd 2953 (1987).

[10] NCLD-OUT Comments at p. 8. It also cites National Broadcasting Co. v. United States, 319 U.W. 190, 219 (1943); GTE Service Corp. v. F.C.C. 474 F.2d 724, 730 (2d Cir. 1973); Rural Telephone Coalition v. F.C.C., 838 F.2d 1307, 1315 (D.C. Cir. 1988).

[11] 47 U.S.C. § 710 and H.R. Rep. No. 888, 97th Cong., 2d Sess. 8 (1982).

[12] United States v. American Telephone and Telegraph Co., 552 F. Supp 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[13] NYNEX Comments at n. 14. *See also* Rural Telephone Coalition; South Carolina *ex re.* Tindal v. Block, 717 F.2d 874 (4th Cir. 1983).

[14] Also, at Section 2(1) of the Disabled Act Congress states that all persons should have access to the best telephone service technically and economically possible.

[15] Automatic Message Accounting (AMA) means "the automatic collection, recording, and processing of information relating to calls for billing purposes." Engineering and Operations in the Bell System, Second Printing, 1978, at p. 631.

[16] A small center is considered to be a unit with the capacity to handle 6,000 to more than 35,000 calls per month, while a large one would serve more than 200,000 calls. In discussing the New York relay system, NYNEX discloses that the system's first year expenses are expected to be $10.9 million and $12.7 million the following year. According to Bay Area Center, an intrastate relay call in California currently costs approximately $7.00, which is subsidized by that state's telephone ratepayers. Using the experience in California and the normal proportion of interstate to intrastate calls, Bay Area Center estimates that an interstate relay system would cost between $2 million to $10 million.

[17] *See* note 7.

[18] *See* Self Help for Hard of Hearing People, Inc. (SHHH) Reply at p. 2.

[19] Because there are more data regarding California's relay system on record than any other we will use it as a model for an interstate system for analysis purposes. The CRS uses an 800 number access means with a centralized relay center, and it is not unreasonable to assume that an interstate system could employ that approach. The record indicates that CRS handles approximately 200,000 TDD relay calls per month. Our understanding is that, as of December 1987, approximately 18,260 TDD were being served. California's population is nearly 23.7 million persons. The percentage of Californians using TDDs is approximately 0.08 percent (18,260 TDD users/23.7 million persons).

[20] *See* AT&T Comments at pp. 18-19. Included in this estimate are costs for the attendant relay function, the equipment and network facilities used to provide the relay service, the building and furniture for the relay operation, the administration/management/personnel, and other services related to the provisioning of relay service. AT&T Comments, "Dual Party Relay for the Deaf Guidelines."

[21] In a June 2, 1989 letter to Sentor Tom Harkin, Chairman, Subcommittee on the Handicapped, AT&T estimated it would cost approximately $30 - 40 million for AT&T to establish an interstate relay system using its existing centers and one additional center. We request comment on this estimate, as well.

[22] Other examples in Texas alone range from under $200 to over $2400 annually.

[23] In 1987, cost of the Universal Service Fund was $499,584,240. The annual cost of interstate TDD relay service is $30 million dollars. The cost of the relay service would represent a 6 percent increase in the Universal Service Fund ($30 million$499,584,240). If transmission costs to and from the center are excluded, and only the center's operational costs are recovered from the Universal Service Fund, the cost is smaller.

[24] Non-coin sent-paid calls are generally considered to be calls paid for via credit cards.

[25] *See* also Dr. Menzel Comments at p. 13.

[26] To the extent that an interstate relay center is thought to be analogous to an interexchange operator center for voice calls, the added transmission costs of routing a call through the center, rather than directly to the called party, would presumably be subsumed within the average transmission costs reflected in the interexchange carriers' distance sensitive, interstate switched service rates. The added costs of an interstate relay service in such a case would consist only of those costs for the relay center.

[27] Cincinnati Bell also is opposed to the burden of funding an interstate relay system being placed on LECs. Instead, it recommends that federal taxes, excise tax credits and user fees be explored as optional funding mechanisms. Cincinnati Bell Comments at p. 4.

[28] SWBT and USTA also oppose this approach. In addition to the arguments TRC presents, SWBT argues that LECs already assist in supporting existing private and state systems. SWBT Reply at p. 8 and USTA Reply at pp. 8-9.

[29] Computerized Position Information System.

[30] Both Baudot and ASCII are currently used among TDD users, though conversion is required to allow a Baudot device to "talk to" an ASCII machine.

[31] It is not clear, however, how Infopath differs from the current ability of modem-equipped PCs to communicate directly with TDDs in the ASCII format.

[32] Incorporating the TDD into the public telephone would complicate and confuse use of public telephone by non-deaf users, according to AT&T. AT&T Comments at p. 28.

[33] "Pay Phone TDD" is a combination payphone and TDD unit. The TDD is located inside a metal drawer underneath the telephone. A protective metal cabinet prevents vandals from tampering with the TDD. When the TDD is in use, the drawer is open so that the keyboard and display are exposed. TACIP Comments, Exhibit at p. 1.

[34] A number of commenters explain that the term "amplified handset" is a misnomer. They state that some people will take the term to mean that the amplification circuitry always is contained in the handset. They point out, however, that often the amplification feature is incorporated into the base of the telephone. Our use of the term "amplified handset" includes telephones with base-installed amplifiers.

[35] Walker Equipment Corporation is supportive of NCLD-OUT's proposal.

[36] The Telecommunications Industry Association/User Premises Equipment Division agrees that such handsets would be useful, but feels that imposition of some arbitrary percentage standard is unjustified and inappropriate.

[37] BellSouth believes the marketplace is moving to address the hearing impaired need for amplification and therefore opposes any arbitrary handset requirement. Likewise, it feels the need for a rule regarding push button telephones is unwarranted.

[38] NYNEX urges the Commission to conduct a cost/benefit analysis to determine whether to adopt a univeral identifying code.

[39] SHHH recommends that "all single, free-standing public coin and credit card operated phones be equipped with some form of amplification then:

1 to 4 phones - 1 amplified

4 to 10 phones - 2 amplified

over 10 phones - 3 amplified" [footnote omitted]

SHHH Reply at p. 2.

[40] Access to Telecommunications Equipment by the Hearing Impaired and Other Disabled Persons, CC Docket No. 83-427, 49 Fed. Reg. 1352 (January 11, 1984), *modified*, 49 Fed. Reg. 1966 (May 9, 1984), *further modified*, FCC 84-382 (released August 13, 1984).

[41] *See* NOI, CC Docket No. 87-124, 2 FCC Rcd 2836 (1987).

[42] According to SHHH, ANSI Standard A 117.1 requires the installation of a volume control telephone in any Federally funded building or facility containing a bank of telephones. Although ANSI lacks enforcement authority, the comments suggest the standard nevertheless is adhered to by many telephone companies.

[43] *See* also US West Comments at pp. 14-15. Pacific and Cincinati Bell also comply with these standards.

[44] Some of the comments recommended publicizing the Commission's telephone hearing aid compatibility requirement. With the recent adoption of rules requiring near universal hearing aid compatibility, the need for additional publicity on this matter has been negated. Moreover, given the rapid turnover of telephones, we expect in a reasonable period that only hearing aid compatible telephones will be available.

[45] Federal Advisory Committee Act, P.L. 92-463.

[46] AT&T is also supportive of this position, noting that the work of such a committee has been done at the state level and the issues need not be revisited.

[47] *See* Pacific Comments at p. 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

HIGH COUNTRY
COMMUNICATIONS

For Construction Permit for a Commercial FM Translator Station to serve Garfield and rural areas, Colorado	BPFT-860314TV BMPFT-860814TA
and	
For Station License for FM Translator Station K228CP Garfield, Colorado	BLFT-860919TA

MEMORANDUM OPINION AND ORDER

Adopted: July 6, 1989; Released: August 10, 1989

By the Commission: Commissioner Quello dissenting; Commissioner Dennis concurring in the result.

1. The Commission has before it for consideration: (a) the letter of March 31, 1988, by the Chief, Audio Services Division, Mass Media Bureau, which dismissed a petition for reconsideration ("petition") filed by William J. Murphy ("Murphy") and granted the above-captioned application by High Country Communications, Inc. ("HCC") for a station license for FM translator station K228CP, Garfield, Colorado; (b) all related pleadings and correspondence to Murphy's petition; (c) the application for review of the staff's action of March 31, 1988, filed by Murphy on May 2, 1988; and, (d) the opposition of HCC to Murphy's application for review.

2. Murphy's petition for reconsideration sought reconsideration of the grant of the above-captioned application by HCC for authority to construct a commercial FM translator station to serve Garfield and rural areas, Colorado on the basis that the 1 mV/m contour of HCC's translator would overlap the 1 mV/m contour of KVRH-FM, Salida, Colorado, in violation of 47 C.F.R. Section 74.1234(d).[1] Murphy, the licensee of KVRH-FM, requested that the Commission conduct a hearing to determine whether HCC has the requisite character qualifications to be a Commission licensee. The application for review filed by Murphy contends that his petition should not have been dismissed because he raised a material and substantial question of fact concerning misrepresentations made by HCC in conjunction with its application for authority to construct FM translator station K228CP. Specifically, Murphy alleges that HCC misrepresented the area intended to be served by that station as including only areas not within the 1 mV/m contour of KVRH-FM, when as demonstrated by HCC's actions, it actually intended to serve Salida and to have its 1 mV/m contour overlap that of KVRH-FM.

3. On review, we conclude that the Bureau properly decided the questions raised in the petition for reconsideration. The Bureau's letter of March 31, 1988, states that Murphy's petition, assuming that it qualified as an informal request for investigation of possible misrepresentations, did not present sufficient cause for further investigation. For the reasons stated herein, we affirm the Bureau's ruling.[2]

Allegations of the Parties

4. On March 14, 1986, HCC submitted the original application for its translator station to serve Garfield and rural areas, Colorado. In the cover letter to that application, J. Daniel Brown, president of HCC, stated that "the restrictions of 47 C.F.R. Section 74.1232(d) do not apply because the intended reception areas [for the translator station] are not within the 1 mV/m field strength contour of another commercial FM radio broadcast station assigned to a different principal community."[3] Because HCC's original application did, in fact, result in overlap of the proposed translator's 1 mV/m contour with the 1 mV/m contour of KVRH-FM, Salida, Colorado and because certain alleged promotional and sales activities on the part of HCC employees allegedly indicated that Salida and Poncha Springs were also within the area to be served by the translator station, Murphy concludes that HCC president J. Daniel Brown intentionally misrepresented HCC's intent to also serve Salida in violation of the Commission's rules. Specifically, in his application for review,[4] Murphy claims that on two occasions a KVLE-FM announcer stated that KVLE-FM served Salida and on one occasion stated its intent to serve Poncha Springs. Murphy further claims that in promotional posters distributed in Gunnison, Colorado, KVLE-FM's community of license, Monarch-Salida was identified as an area served by KVLE-FM. A copy of the poster was provided. Murphy also submits the business card of Geoffrey Brown (no relation to J. Daniel Brown), a salesman for KVLE-FM, which identified Salida as a community served by KVLE-FM. Finally, Murphy points to the fact that the main lobe of the proposed antenna is directed at Salida, not Garfield. All of these factors, Murphy concludes, demonstrate that HCC's true intent in filing its translator application was not to serve Garfield but rather to serve Salida and Poncha Springs.

5. In response, HCC submits the declarations of J. Daniel Brown, Geoffrey Brown, Ron Jablonski (Program Director of KVLE-FM and announcer on duty on the two occasions KVLE-FM allegedly announced that Salida was among the communities it served, and the one occasion on which KVLE-FM allegedly announced that Poncha Springs was among the communities it served) and Janet Brown (wife of J. Daniel Brown and the person who ordered Geoffrey Brown's business cards). In his declarations J. Daniel Brown denies Murphy's claim that HCC's true intent was to serve Salida or Poncha Springs, not Garfield, Colorado and denies having made any misrepresentation to the Commission in this regard. Specifically, J. Daniel Brown states that because Garfield and those surrounding rural areas he intended to serve do not lie within the 1 mV/m contour of KVRH-FM, he believed that the application was in compliance with 47 C.F.R. Section 74.1232(d). He further states that Section 74.1232(d) does not define "intended reception" areas and he did not realize that this area was necessarily coextensive with the proposed translator station's 1 mV/m con-

tour.[5] Rather, he thought the rule only applied to areas that he subjectively intended to serve, rather than areas within the proposed translator's 1 mV/m contour. In this regard, he states that he had no intention to serve the area within the translator's 1 mV/m contour that is also covered by KVRH's 1 mV/m contour. Nevertheless, as soon as it became apparent that "intended reception" area was coextensive with the 1 mV/m contour, J. Daniel Brown asserts that the authorization for K228CP was immediately modified to eliminate any overlap of its 1 mV/m contour with that of KVRH-FM.

6. With respect to the promotional posters exhibited in Gunnison, Colorado, J. Daniel Brown declares that the indication of "Monarch/Salida on the posters was intended as a descriptive designation to advise tourists in the Monarch Pass area (the location of K228CP's transmitter) that KVLE-FM could be received there. Because one of the translator's intended purposes is to provide weather service to motorists, campers and tourists in the area, it was believed that the designation "Monarch/Salida" would advise persons travelling on approaches to the Pass that they could tune in to KVLE-FM. The designation was not, Brown declares, intended to represent that KVLE either served or intended to serve Salida. J. Daniel Brown also states that he never had any intention to serve Salida or Poncha Springs, and that K228CP's proposed 1 mV/m contour did not, in fact, reach these communities[6] Moreover, Brown declares that only ten posters were distributed, all in Gunnison, KVLE-FM's community of license. He also states that Geoffrey Brown's business card was supposed to indicate "Monarch/Salida," not Salida, in order to serve as a description of the area around Monarch Pass, as with the posters.

7. The declaration of Ron Jablonski, announcer on duty on the two occasions KVLE-FM allegedly identified Salida as a community served, and the one occasion on which Poncha Springs was allegedly identified as a community served, specifically denies that he ever made such announcements. Mr. Jablonski further states that in his capacity as Program Director of KVLE-FM, he never instructed any HCC employees, nor was he ever instructed himself by Mr. Brown, to identify Salida or Poncha Springs as communities served by KVLE-FM.

8. With respect to the business cards, Geoffrey Brown states that the cards were supposed to specify "Monarch/Salida" (similar to the promotional posters) but that only Salida was printed. Because he needed the cards and could not wait for them to be reprinted, Geoffrey Brown states that he went ahead and used the cards without the knowledge or consent of J. Daniel Brown. Finally, Janet Brown, who ordered the business cards, states that while she does not remember whether her order designated Salida or Monarch/Salida, they were supposed to say Monarch/Salida, like the posters, and any oversight on her part was inadvertent and not intended to indicate that KVLE-FM serves Salida.

Discussion

9. We conclude, on the basis of the entire record herein, that Murphy has failed to raise a substantial and material question of fact as to possible misrepresentations by HCC concerning the area intended to be served by the translator. The statement in J. Daniel Brown's transmittal letter stating that the translator's intended service area did not fall within the 1 mV/m contour of any other station was clearly incorrect, as the proposed translator's 1 mV/m contour did in fact overlap with the 1 mV/m contour of KVRH-FM.[7] J. Daniel Brown's interpretation of the rule as relating to subjective intent was thus mistaken. Nevertheless, the "bare existence of a mistake" in an application, "without any indication that the licensee meant to deceive the Commission, does not elevate such a mistake to the level of an intentional misrepresentation or raise a substantial and material question of fact." *Kaye - Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979). *See also Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983) (misrepresentation involves "deceptive intent"). There is no evidence before us that suggests that J. Daniel Brown knew his interpretation of the rule was incorrect or that he intended to deceive the Commission in adopting an interpretation of the rule based on subjective intent rather than 1 mV/m contours. Accordingly, his incorrect statement regarding his intended service area, based on his incorrect rule interpretation, is not itself a basis for hearing designation.

10. We next turn to the question of whether, even under J. Daniel Brown's own interpretation of the rule, he misrepresented the intended service area of the translator. We have no evidence before us suggesting that J. Daniel Brown or HCC intended that the translator provide service to those rural areas within the overlap of the 1 mV/m contours of the translator and KVRH-FM. Rather, the issue to which Murphy has directed his primary focus is whether HCC intended to provide service to Salida and Poncha Springs, both of which are within KVRH-FM's 1 mV/m contour. If, under J. Daniel Brown's interpretation of the rule, he had subjectively intended to serve Salida or Poncha Springs, then Mr. Brown's statement that the translator was not intended to serve areas within the 1 mV/m contour of another station would be incorrect and would constitute misrepresentation.[8]

11. Murphy has made specific allegations that the station's promotional posters and business cards proposed service to Salida and these allegations are sufficient to make a *prima facie* case of misrepresentation. Nevertheless, with respect to this question it is highly significant that the record contains no evidence--and indeed, Murphy makes no allegation--that the translator's proposed signal would, in fact, have been receivable in Salida or Poncha Springs. The fact that those communities were not within the proposed translator's 1 mV/m contour thus strongly supports Mr. Brown's rebuttal that HCC did not in fact intend to serve Salida or Poncha Springs. HCC has also adequately explained that the Monarch-Salida identification on the promotional posters was intended to refer generally to the Monarch-Salida or Monarch Pass area and not to the city of Salida itself. Similarly, HCC has explained that Geoffrey Brown's business cards were intended to refer to Monarch-Salida not the city of Salida itself. In light of the fact that the translator's 1 mV/m contour would not in fact have reached Salida, we find these explanations highly persuasive.

12. As to the alleged over-the-air announcements, we note that the one alleged announcement relating to both Salida and Poncha Springs referred only to the "Salida and Poncha Springs *area*" (emphasis added), and therefore even if made, provides no evidence that HCC intended to serve the cities of Salida and Poncha Springs themselves. While one announcement did allegedly refer to service to Salida, rather than the Salida area, in light of all the evidence before us, we do not believe that, even if made,[9]

this sole announcement by a station employee raises a substantial and material question of fact regarding possible misrepresentation by the applicant as to its intended service area. Finally, the mere fact that the main lobe of the translator's proposed antenna was directed at Salida is insufficient to support a finding that HCC intended to provide service to the community of Salida itself. The translator's coverage area, as a technical matter, is not determined by antenna direction alone. In sum, there is no substantial factual and material question in the record of this proceeding to support a conclusion that HCC intentionally misrepresented the area to be served by K228CP. We therefore conclude that the public interest, convenience and necessity are served by grant of HCC's applications. Accordingly, IT IS ORDERED, That the application for review filed by William J. Murphy IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] HCC modified its construction permit on August 14, 1986 (File No. BMPFT-860814TA) to eliminate any overlap to KVRH-FM's 1 mV/m contour.

[2] The Bureau ruled that Murphy failed to establish good cause for not participating earlier in the proceeding. Essentially, Murphy argued that it was unaware that the 1 mV/m contour for K228CP would overlap the KVRH-FM 1 m/Vm contour because HCC's application proposed to serve Garfield and rural areas, not specifically Salida, KVRH-FM's community of license. We agree with the Bureau's conclusion that Murphy had notice that the signal of HCC's proposed new FM translator station might overlap his station's 1 mV/m contour. All Commission notices announcing acceptance of any application specify only the principal city or community proposed to be served by the subject station and do not identify all areas or communities lying within the subject station's proposed service contour. From this notice, interested parties are charged with constructive notice of the subject application even if the community in which their interest lies is not specifically identified. In the instant case, all releases by the Commission indicated that HCC intended to serve not only Garfield, Colorado, but surrounding rural areas as well. Thus, although Garfield is not within the 1 mV/m contour of Murphy's station, it is sufficiently close (7 miles) to have alerted Murphy to the possibility that the translator station's 1 mV/m contour might overlap the 1 mV/m contour of his full service FM station. Moreover, since HCC proposed to serve rural areas located around Garfield and since Murphy's signal covered rural areas around Garfield, he should have been aware of the possibility of overlap. We therefore affirm the Bureau's ruling that Murphy did not show good cause for not participating in the earlier stages of this proceeding and for its treating the pleading as in informal objection rather than as a petition for reconsideration. Moreover, we note that, in addition to the lack of good cause, the basis for Murphy having standing to file a petition for reconsideration--the overlap with the proposed translator--has been eliminated by amendment. Accordingly, it appears that Murphy is no longer aggrieved by the Bureau's grant of the application and therefore lacks standing to file its application for review. *See* 47 U.S.C. Section 155(c)(4); 47 C.F.R. Section 1.115(a). In any event, we hereby review on our own motion the Bureau's denial of Murphy's reconsideration petition.

[3] 47 C.F.R. Section 74.1232(d) provides, in pertinent part:

> An authorization for a commercial FM translator which is intended to provide reception to places which are beyond the predicted 1 mV/m field strength contour of the primary station and within the predicted 1 mV/m field strength contour of another commercial FM radio broadcast station assigned to a different principal community will not be granted to:
>
> (1) The licensee or permittee of an FM broadcast station. HCC is the licensee of KVLE-FM, the primary station rebroadcast over K228CP.

[4] Murphy made various other factual allegations in its previous pleadings that were not repeated in its application for review and, accordingly, are not addressed herein.

[5] It should be noted that translators are not required to put any particular energy contour (such as a 1 mV/m contour) over the community or area to be served. Thus, translator applicants are not required to prepare exhibits to their applications demonstrating the area which lies within their 1 mV/m contours.

[6] The overlap of the K228CP and KVRH-FM 1 mV/m contours occurred in areas north and west of Salida.

[7] The Commission long ago established the 1 mV/m contour as the appropriate predicted contour for FM translator purposes. *See Amendment of Part 74 of the Commission's Rules and Regulations*, 20 Rad. Reg. 2d (P&F) 1538, 1541-42 (1970).

[8] Under the correct interpretation of the rule, there would be no misrepresentation even if HCC had the subjective intent of serving Salida or Poncha Springs, because those cities were not in fact within the translator's proposed 1 mV/m contour.

[9] Murphy has submitted evidence denying that this announcment was ever made.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-351

In the Matter of

Amendment of Section 73.202(b), RM-6377
Table of Allotments,
FM Broadcast Stations
(Carlisle, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 26, 1989; Released: August 11, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Nicholas County Broadcasting (petitioner) seeking the allotment of FM Channel 264A to Carlisle, Kentucky, as that community's first FM broadcast service. Petitioner states his intention to apply for use of the channel if allotted.

2. Channel 264A can be allotted to Carlisle, Kentucky, in compliance with the Commission's minimum distance separation requirements with a site restriction 9.3 kilometers (5.8 miles) northeast of Carlisle.[1] This site restriction is necessary to avoid short spacing to Station WLFX(FM), Winchester, Kentucky, Channel 261C2, formerly Station WFMI(FM).

3. In view of the fact that Carlisle, Kentucky, could receive its first FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Carlisle, Kentucky	--	264A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 2, 1989,** and reply comments on or before **October 17, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Jerrold Miller
Miller and Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The restricted site coordinates are 38-21-02 and 83-55-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-47

In the Matter of

Amendment of Section 73.202(b),	RM-5977
Table of Allotments,	RM-6148
FM Broadcast Stations.	RM-6364
(Oakdale, Tioga and *West Monroe, Louisiana)*	RM-6365

SECOND REPORT AND ORDER
AND MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1989; Released: August 11, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *First Report and Order*, 53 FR 40890, October 19, 1988, which postponed final disposition on a petition for rule making filed by Phoenix Broadcasting Company ("Phoenix"), requesting the substitution of Channel 252C2 for Channel 252A at West Monroe, Louisiana, and the modification of the license for Station KYEA(FM) at West Monroe to reflect the higher class co-channel. In addition, the *First Report and Order* allotted Channel 254C2 to Oakdale, Louisiana, and Channel 278C2 to Tioga, Louisiana. The *First Report and Order* also modified the licenses of Stations KICR-FM at Oakdale and KISY(FM) at Tioga to specify operation on Channel 254C2 (in lieu of Channel 285A) and 278C2 (in lieu of Channel 252A), respectively. The final disposition of Phoenix's proposal was withheld until the issuance of a construction permit and license to Station KISY(FM) at Tioga for Channel 278C2. C. R. Crisler ("Crisler") and Phoenix, licensee of Station KYEA(FM) at West Monroe filed petitions for reconsideration directed against the *First Report and Order*. Cavaness Broadcasting, Inc. ("Cavaness"), licensee of Station KISY(FM) at Tioga, Louisiana, filed comments opposing Phoenix's reconsideration.

2. Subsequently, Crisler filed a request for withdrawal of his petition for reconsideration. As requested, we shall dismiss Crisler's petition for reconsideration.

BACKGROUND

3. The Commission issued the *Notice of Proposed Rule Making*, 3 FCC Rcd 973 (1988), in response to mutually exclusive petitions for rule making filed by Cavaness and Oakdale Limited Partnership ("Oakdale Limited"), licensee of Station KICR-FM at Oakdale, Louisiana, proposing optionally the allotment of either Channel 253C2 to Tioga or Channel 254C2 to Oakdale. Additionally, the *Notice* proposed the substitution of either Channel 253C2 for Channel 252A at Tioga or Channel 254C2 for Channel 285A at Oakdale, as well as the modification of the respective licenses of Stations KISY(FM) and KICR-FM. In response to the *Notice* counterproposals were filed by Cavaness and Phoenix. Cavaness suggested the use of Channel 278C2 at Tioga, rather than the initially proposed adjacent Channel 253C2. Phoenix requested the substitution of Channel 252C2 for Channel 252A at West Monroe, Louisiana, and modification of its station's license to specify the higher class co-channel.

4. In the *First Report and Order*, we allotted Channel 254C2 to Oakdale and modified Station KICR-FM's license to specify operation on Channel 254C2 in lieu of Channel 285A. In addition, Channel 278C2 was substituted for Channel 252A at Tioga and the license of Station KISY(FM) was modified accordingly, thereby providing Oakdale and Tioga with a first wide coverage area FM service. We also granted a contingency upgrade at West Monroe for Station KYEA(FM), substituting Channel 252C2 for Channel 252A. We stated that final action to modify Station KYEA(FM) to Channel 252C2 would be held in abeyance until the issuance of a construction permit to Station KISY(FM) for Channel 278C2 at which time, the Commission would issue the *Second Report and Order* granting the upgrade of Station KYEA(FM) to Channel 252C2 conditioned on the licensing of Station KISY(FM) at Tioga in accordance with its construction permit.

PETITION FOR PARTIAL RECONSIDERATION

5. Phoenix seeks partial reconsideration[1] of the Commission's decision to withhold final action on the upgrade of Station KYEA(FM) at West Monroe, until Station KISY(FM) at Tioga receives a construction permit and license for Channel 278C2. Phoenix argues that Station KYEA(FM) should be granted the construction permit simultaneously with the grant of the construction permit for Station KISY(FM). It objects to the delay that may be caused by the issuance of a *Second Report and Order*. In addition, Phoenix urges the Commission to consider allotting Channel 252C1 to West Monroe, rather than the Class C2 facility initially requested. Phoenix points to the fact that Oakdale Limited previously demonstrated the higher class frequency was available in reply comments herein. In filing the partial reconsideration, Phoenix stressed that it was not seeking a stay of the *First Report and Order*.

6. Cavaness, in its response to the petition for partial reconsideration, states that it would be premature to grant Phoenix's petition. It further states that Phoenix cannot operate on the higher class frequency until Cavaness is licensed to operate on Channel 278C2. Therefore, Cavaness contends that no public interest benefit can be derived by permitting Phoenix to upgrade before the channel is available. Cavaness asserts that Phoenix is also prevented from filing a contingent application by Section 73.3517 of the Commission's Rules. Thus, Cavaness contends that the Commission's action deferring modification of Phoenix's station is proper.

DISCUSSION

7. The Petition for Partial Reconsideration will be denied. We recognize that Phoenix has a strong desire to expeditiously provide expanded FM service to West Monroe. However, under the circumstances the relief sought by Phoenix cannot be granted. We determined that the

issuance of a construction permit and a license to Station KISY(FM) reflecting Channel 278C2 was prerequisite to the allotment of Channel 252C2 at West Monroe, since a short spacing existed to Channel 252A at Tioga. The short spacing prohibited the allotment of Channel 252C2 at West Monroe since to do so would violate the Commission's minimum distance separation requirements. Therefore, Channel 252C2 at West Monroe was not technically acceptable until Channel 252A was vacated at Tioga consistent with the *First Report and Order*.[2] *See Notice of Proposed Rule Making Brownwood, Texas*, 2 FCC Rcd 6803 (1987); *Notice of Proposed Rule Making Farwell, Texas*, 2 FCC Rcd 5966 (1987); and *Eddyville and Fort Madison, Iowa*, 52 FR 48690, December 24, 1987.

8. We stated in the *First Report and Order* final action on the substitution of Channel 252C2 for Channel 252A at West Monroe would be withheld until a construction permit is issued to Station KISY(FM) for Channel 278C2. Furthermore, we stated that once the construction permit has been issued to Station KISY(FM) specifying operation on Channel 278C2 in lieu of Channel 252A, a *Second Report and Order* would be issued allotting Channel 252C2 to West Monroe. On June 23, 1989, Station KISY(FM) at Tioga was granted a construction permit (BPH-890303IB) for Channel 278C2. This grant permits final action to be taken on allotment of Channel 252C2 at West Monroe.

9. However, in considering Phoenix's request to allot a Class C1 to West Monroe instead of a Class C2, as initially proposed, we find that the proposal for a higher class channel is unacceptable in the context of this proceeding, since the proposal was advanced in reply comments in violation of Section 1.420(d) of the Commission's Rules, which specifically requires any counterproposal to be advanced in initial comments. Thus, we shall not consider the higher class proposal in this proceeding. However, Phoenix is free to advance the proposal in a separate petition for rule making.

10. Based on the aforementioned, we believe the public interest would be served by the substitution of Channel 252C2 for Channel 252A at West Monroe, providing that community with a first wide coverage area service. The substitution can be made in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.3 kilometers (10.1 miles) northeast of the city.[3] The restriction is necessary in order to avoid short spacings to Station KTAL-FM, Channel 251C, Texarkana, Texas, and Station KPCH(FM), Dubach, Louisiana.

11. As requested, we are modifying the license of Station KYEA(FM) to specify operation on Channel 252C2 in accordance with Section 1.420(g) of the Commission's Rules. However, this modification is expressly conditioned on the actual licensing of Station KISY(FM) at Tioga, Louisiana, in accordance with its outstanding construction permit for operation on Channel 278C2.

12. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 25, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
West Monroe, Louisiana	252C2

13. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Phoenix Broadcasting Company, for Station KYEA(FM), West Monroe, Louisiana, IS MODIFIED, to specify operation on Channel 252C2 in lieu of Channel 252A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

14. Accordingly, the Petition for Reconsideration filed by C. R. Crisler IS HEREBY DISMISSED.

15. In view of the foregoing, IT IS ORDERED, That the Petition for Partial Reconsideration, filed by Phoenix Broadcasting Company, IS DENIED.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Phoenix also filed a "Motion for Leave to File Supplement to Petition for Partial Reconsideration." In accordance with Section 1.429(d) of the Commission's Rules we shall not consider Phoenix's supplement.

[2] The *First Report and Order* established an effective date of November 30, 1988, for the Table of Allotments to reflect the removal of Channel 252A and addition of Channel 278C2 at Tioga. Within 90 days therafter the licensee of Station KISY(FM) was required to submit its application effectuating the change. The application was filed accordingly.

[3] The coordinates are 32-37-28 and 92-01-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-520

In the Matter of

Amendment of Section 73.202(b),	RM-6516
Table of Allotments,	RM-6585
FM Broadcast Stations.	RM-6651
(Woodstock, Broadway, Buena Vista,	RM-6652
Staunton, New Market, Mount	RM-6653
Jackson and Orange, Virginia)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1989; Released: August 11, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 3 FCC Rcd 6512 (1988), issued in response to a petition for rule making filed by Ruarch Associates ("Ruarch"), permittee of Station WAZR(FM), Channel 240A, Woodstock, Virginia, proposing the substitution of Channel 241B1 for Channel 240A at Woodstock and the modification of the station's construction permit to specify operation on the higher class channel. Ruarch also suggests the substitution of Channel 226A for Channel 238A at Broadway, Virginia, in order to accommodate the upgrade at Woodstock. In addition, Massanutten Broadcasting Co., Inc. ("Massanutten"), the permittee of Station WLTK(FM) at Broadway, was ordered to show cause why its permit should not be modified to specify operation on Channel 226A in lieu of Channel 238A. The Commission subsequently issued *Orders to Show Cause*, 4 FCC Rcd 3598 (1989), in response to several counterproposals advanced in connection with this proceeding. First, Massanutten suggests the substitution of Channel 241B1 for Channel 238A at Broadway and the modification of its permit accordingly (RM-6652). Moreover, Massanutten suggests the substitution of either 229A or Channel 229B1 for Channel 240A at Woodstock in order to accomplish the upgrade at Broadway. Additionally, the proposed substitution of Channel 229B1 at Woodstock required the substitution of Channel 226A for Channel 228A at Staunton, Virginia, and the modification of the license of Station WSGM(FM) at Staunton. Therefore, Clark Broadcasting Company, the licensee of Station WSGM(FM) at Staunton, was ordered to show cause why its license should not be modified in order to accomplish the upgrade at Woodstock.

2. Second, Shenandoah County Broadcasting Corporation ("Shenandoah"), permittee of Station WSIG(FM), Channel 245A, Mount Jackson, Virginia, suggests in its counterproposal the substitution of Channel 245B1 for Channel 245A at Mount Jackson and the modification of its permit to specify the higher class channel (RM-6585). Shenandoah also suggests the substitution of Channel 241A for Channel 244A at Orange, Virginia, and the modification of the license of Station WVJZ(FM) at Orange. An order to show cause was also issued to Radio Virginia Limited Partnership, the licensee of Station WVJZ(FM) at Orange seeking comments as to why its license should not be modified to accommodate the upgrade at Mount Jackson.

3. In addition, Charles B. Johnson ("Johnson"), filed a counterproposal seeking the allotment of Channel 226A to New Market, Virginia, as that community's first local FM service (RM-6653).

4. Finally, we entertained a counterproposal filed by Equus Communications, Inc. ("Equus"), licensee of Station WVLI(FM), Channel 244A at Buena Vista, Virginia, requesting the substitution of Channel 245B1 for Channel 244A and modification of its station's license accordingly (RM-6651).

5. Equus and Shenandoah filed supporting comments in response to the *Orders to Show Cause*. Ruarch filed reply comments. No other comments were received. Equus, Shenandoah and Ruarch restated their interest in the proposals for accomplishing the upgrades at Buena Vista, Mount Jackson and Woodstock. Ruarch further asserts that since both Station WSGM(FM) at Staunton and Station WVJZ(FM) at Orange have failed to respond to the show cause orders they should be deemed to have consented to the proposed modification of those facilities.

6. As stated in the *Orders to Show Cause*, the counterproposals were mutually exclusive with Ruarch's proposal due to the suggested use of either Channel 241(A or B1) or Channel 226A at other cities. (1) Massanutten's proposal to substitute Channel 241B1 for 238A at Broadway and Channel 229A for Channel 240A at Woodstock directly conflicted with Ruarch's proposal for Channel 241B1 at Woodstock. (2) Massanutten also suggests an alternative proposal which would permit both Broadway and Woodstock to accomplish upgrades by the substitution of Channel 241B1 at Broadway and the substitution of Channel 229B1 for Channel 240A at Woodstock. The substitution of Channel 229B1 at Woodstock requires the substitution of Channel 226A for Channel 228A at Staunton. (3) Johnson's proposal to allot Channel 226A to New Market conflicts with Ruarch's proposal to use Channel 226A at Broadway, as well as the use of Channel 226A at Staunton. (4) Shenandoah's proposal to substitute Channel 245B1 for Channel 245A at Mount Jackson also conflicts with the proposals to use Channel 241B1 at either Woodstock or Broadway since it requires the substitution of Channel 241A for Channel 244A at Orange. (5) The Equus proposal to substitute Channel 245B1 for Channel 244A at Buena Vista is mutually exclusive with the proposal to allot Channel 245B1 at Mount Jackson.

7. Based on the information provided, we determined that alternative channels were available to resolve the aforementioned conflicts, thus permitting each proponent to be accommodated with new or improved broadcast service. Channel 277A can be allotted to New Market, as that community's first local FM service. In addition, Channel substitutions can be made at Buena Vista (Channel 244B1 for Channel 244A), Broadway (Channel 241B1 for Channel 238A), Mount Jackson (Channel 245B1 for Channel 245A) and Woodstock (Channel 229B1 for Channel 240A), providing each community with a first wide coverage area FM service.

8. Channel 277A can be allotted to New Market in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.7 kilometer (0.4 mile) west of the city.[2] The restriction is necessary in order to avoid a short spacing to Station WYFT(FM), Channel 280A at Luray, Virginia.

9. Furthermore, the other communities may receive allotments consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules. Channel 229B1 can be substituted for Channel 240A at Woodstock, with a site restriction, provided Channel 226A is substituted for Channel 228A at Staunton. A site restriction of 21.8 kilometers (13.5 miles) west of the city is required.[3] The restriction is necessary in order to avoid short spacings to Station WKYS(FM), Channel 230B, Washington, D.C., and Station WCST-FM, Channel 228A, Berkeley Springs, West Virginia. Channel 226A can be used at the current transmitter site of Station WSGM(FM) at Staunton.[4]

10. Channel 241B1 can be substituted for Channel 238A at Broadway at the current transmitter site specified in the construction permit for Station WLTK(FM).[5] Channel 240A must be vacated at Woodstock. Therefore, the allotment of Channel 241B1 at Broadway is expressly conditioned on Station WAZR(FM) at Woodstock effectuating the channel change in accordance with this *Order*.

11. Channel 245B1 can be substituted for Channel 245A at Mount Jackson with a site restriction of 7.6 kilometers (4.7 miles) west of the city, provided Channel 255A is substituted for Channel 244A at Orange.[6] Channel 255A can be substituted at the current transmitter site for Station WVJZ(FM) at Orange.[7] The 7.6 kilometers site restriction for Channel 245B1 is required in order to avoid a short spacing to Station WASH(FM), Channel 246B, Washington, D.C.

12. Channel 244B1 can be substituted for Channel 244A at Buena Vista with a site restriction of 11.6 kilometers (7.2 miles) east of the city.[8] The restriction is required in order to avoid a short spacing to Station WRRL-FM, Channel 244A, Rainelle, West Virginia. The allotment of Channel 244B1 at Buena Vista is expressly conditioned on Station WVJZ(FM) at Orange specifying operation on Channel 255A in lieu of Channel 244A in conjunction with the upgrade of Station WSIG(FM) at Mount Jackson. *See* para. 11 *supra*.

13. Since the foregoing allotments at Broadway, Buena Vista, Mount Jackson, New Market, Staunton and Woodstock are located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia, parties are required to comply with the notification requirements of Section 73.1030(a) of the Commission's Rules.

14. We believe the public interest would be served by the proposed allotment and channel substitutions in the various Virginia communities. In accordance with Section 1.420(g) of the Commission's Rules, we have authorized the modification of the license of Station WVLI(FM) at Buena Vista, as well as the modification of the construction permits for Station WAZR(FM) at Woodstock, Station WLTK(FM) at Broadway, and Station WSIG(FM) at Mount Jackson.

15. Since Radio Virginia Limited Partnership and Clark Broadcasting Company have not responded to the *Orders to Show Cause* we deem them to have consented to the modification of their licenses, in order to accomplish the upgrades at Mount Jackson and Woodstock, respectively.

16. In accordance with Commission policy Station WSGM(FM) at Staunton and Station WVJZ(FM) at Orange are entitled to reimbursement for the reasonable costs of changing their frequencies by the benefiting party. *See Circleville and Columbus, Ohio*, 8 FCC 2d 159 (1967). Ruarch and Shenandoah have expressed their willingness to reimburse in order to accomplish their desired stations upgrades. As stated in the *Orders to Show Cause*, although Channel 244B1 at Buena Vista also requires the channel change at Orange, Equus would not be required to share in the reimbursement of Station WVJZ(FM) since, comparing Mount Jackson and Buena Vista for the then proposed Channel 245B1 based on the information provided, the Buena Vista proposal would prevail.

17. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 25, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

City	Channel No.
Broadway, Virginia	241B1
Buena Vista, Virginia	244B1
Mount Jackson, Virginia	245B1
New Market, Virginia	277A
Orange, Virginia	255A
Staunton, Virginia	226A, 232B1, 259B
Woodstock, Virginia	229B1

18. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following: Radio Virginia Limited Partnership, 1400 Mercantile Lane, Landover, MD 20785; and Clark Broadcasting Company, P. O. Box 2189, Staunton, VA 24401.

19. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Massanutten Broadcasting Co., Inc., for Station WLTK(FM), Broadway, Virginia, IS MODIFIED, to specify operation on Channel 241B1 in lieu of Channel 238A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

20. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Ruarch Associates for Station WAZR(FM), Woodstock, Virginia, IS MODIFIED, to specify operation on Channel 229B1 in lieu of Channel 240A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

21. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Clark Broadcasting Company for Station WSGM(FM), Staunton, Virginia, IS MODIFIED, to specify operation on Channel 226A in lieu of Channel 228A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-861229KA except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-861229KA except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

22. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Shenandoah County Broadcasting Corporation for Station WSIG(FM), Mount Jackson, Virginia, IS MODIFIED, to specify operation on Channel 245B1 in lieu of Channel 245A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

23. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Radio Virginia Limited Partnership for Station WVJZ(FM), Orange, Virginia, IS MODIFIED, to specify operation on Channel 255A in lieu of Channel 244A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-800508AK except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-800508AK except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

24. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Equus Communications, Inc., for Station WVLI(FM), Buena Vista, Virginia, IS MODIFIED, to specify operation on Channel 244B1 in lieu of Channel 244A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

25. The window period for filing applications for Channel 277A at New Market, Virginia, will open on **September 26, 1989,** and close on **October 26, 1989.**

26. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

27. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Mount Jackson and Orange, Virginia, have been added to the caption. The communities were listed on the Public Notice of counterproposals for January 23, 1989, Report No. 1766.

[2] The restricted site coordinates are 38-38-00 and 78-42-42.

[3] The coordinates are 38-48-18 and 78-44-18.

[4] The coordinates are 38-10-27 and 79-04-12.

[5] The coordinates are 38-33-50 and 78-57-00. These revised coordinates reflect those specified in BMPH-880520IC.

[6] The restricted site coordinates are 38-44-41 and 78-43-51 for Channel 245B1 at Mount Jackson.

[7] The coordinates are 38-15-14 and 78-07-15. These coordinates reflect the site specified in the license and an outstanding construction permit. *See* BLH-800508AK and BPH-880509JL.

[8] The restricted site coordinates are 37-43-22 and 79-13-23.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-380

In the Matter of

Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations. (Jonesboro, Arkansas) — RM-6264

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 28, 1989; Released: August 11, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 3 FCC Rcd 4791 (1988), issued in response to a petition filed on behalf of Outlaw Broadcasting (petitioner), proposing the allotment of UHF television Channel 48 to Jonesboro, Arkansas, as that community's second local commercial television broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. Jonesboro (population 31,530),[1] seat of Craighead County (population 63,239), is located in northeastern Arkansas, approximately 180 kilometers (110 miles) northeast of Little Rock.

3. We believe the public interest would be served by allotting Channel 48 to Jonesboro, as that community's second local television broadcast service. As indicated in the *Notice*, Channel 48 can be allotted to Jonesboro consistent with the Commission's rules and policies.[2]

4. Although the Commission has imposed a freeze on television allotments or applications therefor in certain metropolitan areas, Jonesboro is not one of the affected areas. *See Order*. 52 FR 28346 (July 29, 1987).

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 25, 1989,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED with regard to the community listed below, as follows:

City	Channel No.
Jonesboro, Arkansas	8-,*19+,48+

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the application filing process should be addressed to the Video Services Division, Television Branch, Mass Media Bureau, (202) 632-6357.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Population figures were taken from the 1980 U.S. Census.

[2] Coordinates used in this determination are 35-50-12 and 90-42-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-463

In the Matter of

Amendment of Section 73.202(b),	RM-6360
Table of Allotments,	
FM Broadcast Stations.	
(Wilson, Arkansas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 28, 1989; Released: August 11, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 5753 (1988), issued in response to a petition filed on behalf of Clarence Medlin (petitioner), proposing the allotment of FM Channel 279A to Wilson, Arkansas, as that community's first local broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 279A to Wilson, Arkansas, since it could provide a first local broadcast service to the community.

3. As indicated in the *Notice*, Channel 279A can be allotted to Wilson in conformity with the minimum distance separation requirements set forth in Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 7.6 kilometers (4.7 miles) southwest[1] of the community to avoid short spacing to Station WAAW(FM), Channel 279C1, Murray, Kentucky[2] and to Station WWKZ(FM), Channel 278C, New Albany, Mississippi.[3]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 25, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Wilson, Arkansas	279A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 279A at Wilson, Arkansas, will open on **September 26, 1989,** and close on **October 26, 1989.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the restricted site are 35-32-38 and 90-07-10.

[2] Coordinates at the licensed site of Station WAAW(FM) are 36-32-58 and 88-19-52.

[3] Coordinates at the licensed site of Station WWKZ(FM) are 34-23-52 and 88-53-03.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-388

In the Matter of

Amendment of Section 73.202(b),	RM-6374
Table of Allotments,	
FM Broadcast Stations.	
(Glencoe, Alabama)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 28, 1989; Released: August 11, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 5007 (1988), issued in response to a petition filed by Bill Dunnavant (petitioner), proposing the allotment of FM Channel 226A to Glencoe, Alabama, as that community's first local broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 226A to Glencoe, Alabama, since it could provide a first local broadcast service to the community.

3. As indicated in the *Notice*, Channel 226A can be allotted to Glencoe in conformity with the minimum distance separation requirements set forth in Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 6.1 kilometers (3.8 miles) east[1] of the community to avoid short spacing to the site specified in the construction permit issued to Station WKQD-FM, Channel 227C1, Tullahoma, Tennessee.[2] Imposition of the site restriction also clears the licensed sites of Station WDJC(FM), Channel 229C, Birmingham, Alabama,[3] and Station WQEN(FM), Channel 279C, Gadsden, Alabama.[4]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 25, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Glencoe, Alabama	226A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 226A at Glencoe, Alabama, will open on **September 26, 1989,** and close on **October 26, 1989.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the restricted site are 33-56-44 and 85-52-19.

[2] Coordinates at the construction permit site of Station WKQD-FM are 35-02-04 and 86-22-52.

[3] Coordinates at the licensed site of Station WDJC(FM) are 33-26-36 and 86-52-50.

[4] Coordinates at the licensed site of Station WQEN(FM) are 33-57-11 and 86-13-00.

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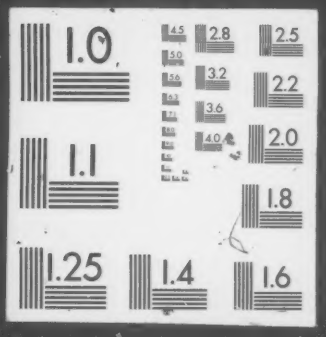
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